DOCUMENT RESUME

ED 392 080 CS 509 174

TITLE Proceedings of the Annual Meeting of the Association for Education in Journalism and Mass Communication (78th, Washington, DC, August 9-12, 1995). Law Division.

INSTITUTION Association for Education in Journalism and Mass Communication.

PUB DATE Aug 95

NOTE 422p.; For other sections of these proceedings, see CS 509 173-187 and CS 509 196.

PUB TYPE Collected Works - Conference Proceedings (021)

EDRS PRICE MF01/PC17 Plus Postage.

DESCRIPTORS Censorship; *Constitutional Law; Copyrights; Higher Education; *Information Networks; Information Services; *Internet; *Journalism; Journalism Research; Legal Responsibility; *Libel and Slander; Mass Media Use; Online Systems; Universities

IDENTIFIERS First Amendment; *Journalists; Press Law; United States Constitution

ABSTRACT

The law section of the Proceedings contains the following 12 papers: "Constitutional Considerations of the Escrowed Encryption Standard" (Pat Bastian); "Exploring the Link between Source Credibility and Reputational Harm: Effects of Publication Type on Belief of Potentially Defamatory Statements" (Kenneth R. Blake); "Legislative Magic and the Leonard Law: Turning Private Universities into Public Entities" (Clay Calvert); "Technical Innovation Meets Economic and Financial Monopoly: The Clear Channel Group and the Clear Channel Issue, 1934-1941" (James C. Foust); "Alachua Free-Net: Looking for the First Amendment at One Outpost on the Information Highway" (David R. Friedman and Matt Jackson); "Speakers' Rights in Private Forums: How the First Amendment Might Look on the Information Superhighway" (Michelle Johnson); "Retractions to Avoid Libel Suits: The Uniform Correction or Clarification of Defamation Act versus Tennessee Law" (Kelly C. Lockhart and Geoffrey Hull); "Who Belongs to the Privileged Class? Journalistic Privilege for Non-Traditional Journalists" (Priscilla Coit Murphy); "Taming the Watchdog: Justice Byron White and the Repudiation of Press Privilege" (Alan Prendergast); "Anti-Abortion Political Ads: Balancing Questions of Indecency, Censorship, and Access" (Michael Spillman); "'Living Law' in the Newsroom: A Study of Social Influences" (Paul S. Voakes); and "When Copyright Law Silences Creativity: Digital Sampling and a Group Called 'Negativland'" (Sylvia E. White). (CR)

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CONSTITUTIONAL CONSIDERATIONS OF THE ESCROWED ENCRYPTION STANDARD

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CONSTITUTIONAL CONSIDERATIONS OF THE ESCROWED ENCRYPTION STANDARD

> *Whether the computer revolution will be allowed to destroy what the American revolution won for us remains to be seen.*[1]
>
> --- George B. Trubow

I. INTRODUCTION

Legal and political theorists, sociologists and philosophers have long-debated the merit of unconstrained speech. One perspective recognizes speech as a fundamental human need for self-expression; another considers the open marketplace of ideas crucial to the health of democracy. Regardless of the value of free speech -- individuality or community or a combination of the two -- the Bill of Rights provides a clear blueprint for expressive rights.

Explicit freedoms of speech, press and assembly and the implicit right to privacy are based on these bedrock principles. Supreme Court interpretations of the First Amendment enjoin the government from prohibiting speech with which it disagrees[2] or restricting speech before its utterance[3] unless it has been established that such constraints would serve a narrowly-defined compelling government interest. In theory, at least, such principles would not vary with the method of communication.

But in 1791, when the first ten amendments to the Constitution were written, communication was simpler than today. People spoke and wrote, listened and read. They chose the recipients of their communications and concealed private documents and confidential conversations behind locked doors. The Constitution guaranteed the collective right to these actions.

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[1] Trubow, "The Fourth Amendment, Privacy, and Modern Technology: A Time for Reassessment," *A Time for Choices,* p.29

[2] *Texas v. Johnson*, 491 U.S. 397 (1989)

[3] *Near v. Minnesota*, 283 U.S. 697 (1931)

Today the complications of electronic communication challenge these simple precepts. The abstraction of networked data transfer forces us to rethink traditional definitions of privacy, speech and publication. This paper will explore the controversial Escrowed Encryption Standard (EES), a federal plan to protect telephone and computer communications from illegal interception and to allow government access to these communications for surveillance. It will examine the plan's constitutional implications, with specific attention to the First, Fourth and Fifth Amendments.

II. THE TECHNOLOGY EXPLOSION

Twelve years ago Ithiel de Sola Pool predicted a massive confluence of electronic communications systems in his prescient book, *Technologies of Freedom:*

> To serve the public, there will be networks on networks on networks. Separate nations will have networks, as they do now, but these will interconnect. Within nations, the satellite carriers, microwave carriers, and local carriers may be -- and in the United States almost certainly will be -- in the hands of separate organizations, but again, they will interconnect. So even the basic physical network will be a network of networks. And on top of these physical networks will be a pyramid of service networks. Through them will be published or delivered to the public a variety of things: movies, money, education, news, meetings, scientific data, manuscripts, petitions, and editorials.[4]

Today we approach that vision. ARPAnet, the first generation of the Internet, was a 1969 experiment to connect the U.S. Defense Department communications in a system that could withstand partial outages (as in the case of nuclear attack).[5] It has since grown exponentially and now the Internet connects individuals and institutions -- educational, government, commercial and research -- worldwide. It began with four university computers. Today it is a global network of over three million host computers and 20 to 30 million individual computers[6] that is owned by no one. The Internet crosses and blurs the traditional lines between public and private fora, speech and press, cities, states and countries.

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[4] de Sola Pool, *Technologies of Freedom*, p.227

As the massive *networks on networks on networks* has flourished, so has the diversity of participants. While the original ARPAnet was accessible only to scientists who had mastered arcane commands, today students, citiizens, and children in the mainstream population obtain information and communicate. Communication on the Internet takes many forms. Anyone with a computer, a modem, and a connection to the system may use one-to-many platforms to publish or participate in discussions. The same person may also use E-mail to communicate on a one-to-one basis.

III. SECURITY

One requirement that all computer users -- private, commercial and government -- agree upon is the need for security. In the physical world spaces are defined in tangible ways.

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[5] - Gibbs and Smith, *Navigating the Internet* p.5. The Internet began in 1969 as ARPANET, a network of four computers at the Universities of Utah, California at Santa Barbara, California at Los Angeles, and Stanford Research Institute International. One of its goals was to develop flexible communications systems between computers for the government and the military.

[6] Press Release, The Internet Society, Aug. 5, 1994

Borders demarcate countries, fences enclose real property, walls contain homes and offices. We lock sensitive or personal documents in safes and choose the recipients of our communication. Written correspondence is sealed and addressed; it is not posted on public bulletin boards. The times, places and manners of private conversations are designed to preclude intrusion.

The cyberspace[7] equivalent of sealed envelopes is encryption. Encryption technology employs hardware and/or software to ensure that electronic communication -- voice and data -- is not intercepted by unwelcome and unintended parties. The technology permits communicators transmitting across telephone lines to encode conversations or data and permit only the intended recipient(s) to decode the message.

As of November, 1993, there were approximately 200 non-U.S. and about 300 U.S.-based cryptographic products.[8] One product, *Pretty Good Privacy* (PGP), is considered uncrackable and is available to computer operators world-wide as a free, downloadable program.[9]

The U.S. government has used an encryption method, Data Encryption Standard

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[7] This word was created by William Gibson in his novel *Neuromancer* to describe the place without physical dimensions where computer data is stored and communications take place.

[8] Hoffman, "Who hold cryptographic keys?", *Computer*, p.76

[9] Bulkeley, "Cipher probe: Popularity overseas of encryption code has the U.S. worried," *The Wall Street Journal*, Apr 28, 1994 (sec. A, p.1, col. 1)

(DES), since January, 1977. DES is recertified every five years by the National Security Agency[10] but is now considered obsolete or near-obsolete by government and industry standards.[11]

IV. WIRETAPPING

The problem with sophisticated encryption technology is that it may also be used to cloak illegal activities. A 1994 White House press statement acknowledged the problem: "Unfortunately, the same encryption technology that can help Americans protect business secrets and personal privacy can also be used by terrorists, drug dealers, and other criminals."[12] Simply put, strong encryption technology obstructs law enforcement surveillance.

The U.S. State Department recognizes encryption products as a threat to U.S. security and imposes strict control on their export. The International Traffic in Arms Regulation (ITAR) requires a munitions export license for manufacturers to export strong encryption products. Even the weak DES algorithm[13], which is widely available on computer bulletin boards world-wide, requires this license.

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[10] "Defending Secrets, Sharing Data: New Locks and Keys for Electronic Information," U.S. Congress, Office of Technology Assessment, OTA-CIT-310, Oct. 1987, pp.169-171

[11] Heinlein, "Communications, Security, Privacy and the Law," *Computers and Security,* April 1994, p.119

[12] Statement of the Press Secretary, The White House, Feb. 4, 1994, Para. 2

[13] An algorithm is a mathematical operation. In computer encryption, the algorithm is the formula that encodes the data.

IV. THE CLIPPER CHIP

In April, 1993 the Clinton Administration announced a comprehensive review of encryption technology, to be conducted by the National Security Council. At that time the Administration also announced the development of the Clipper Chip, a microcircuit using an encryption algorithm known as Skipjack.

The Clipper Chip was designed in secrecy by the National Institute of Standards and Technology (NIST) to encrypt voice transmissions in new digital telephones. Skipjack's most controversial feature is the access it provides law enforcement for surveillance of communications transmitted over telephone lines. Access is made available through a "back door" which is unlocked by a two-part key. Each part is to be held "in escrow" by separate federal departments (Treasury and Commerce). The two parts may be joined to allow decryption by federal agents holding the appropriate warrant, under "the existing legal and procedural requirements that protect Americans from unauthorized wiretaps."[14]

VI. THE ESCROWED ENCRYPTION STANDARD AND THE DIGITAL TELEPHONY BILL

> *The issues of decoding what is being said to whom, from whom, and at what locations marks a first for the relationship between our government and its people. Historically, the federal government has worked within the law and found technological solutions that have resulted in their legal access to private citizens phone conversations. They now must come to us, and ask that we essentially give them the keys to our conversations in hopes that they may be*

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[14] Statement of the Press Secretary, Op Cit. para 5

able to curb crime.[15]

Encryption is not the only obstacle to law enforcement's electronic eavesdropping. Emerging digital technology has also thwarted wiretapping efforts with cellular phones and features like call forwarding. In February, 1994 Vice President Al Gore and FBI Director Louis Freeh announced their joint support for two separate but related plans, the Edwards/Leahy Digital Telephony Legislation (HR 4922/S 2375) and The Escrowed Encryption Standard (EES).

HR4922, also known as the Digital Telephony Bill, mandated the reconfiguration of telephone network hardware by telecom carriers to facilitate wiretapping by law enforcement officers. The bill allocated $500 million in federal funds to assist carriers in its execution and stipulated that future communications technology must include entry points for law enforcement surveillance. It was passed October 7, 1994.

The Escrowed Encryption Standard replaces DES as the United States federal government standard and enables government agencies to purchase the Clipper Chip for use in telephones and modems[16]. The White House also announced that it had found a solution to the dilemma of securing private and business conversations while keeping the door open for wiretapping: the Clipper Chip would be available for use in the private and commercial sectors. They said that the system would be applied only to voice transmissions -- not computer data -- and would be purely voluntary.

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[15] "National security vs. personal privacy," *EDGE: Work-Group Computing Report*, Sept 5, 1994

[16] Statement of the Press Secretary, Op Cit.

The Administration also announced that new procedures would allow the export of the Clipper Chip to most countries. Export restrictions on other strong encryption products would remain in place:

> We understand that many in industry would like to see all encryption products exportable. However, if encryption technology is made freely available worldwide, it would no doubt be used extensively by terrorists, drug dealers,and other criminals to harm Americans both in the U.S. and abroad. . . the administration will continue to restrict export of the most sophisticated encryption devices, both to preserve our own foreign intelligence gathering capability and because of the concerns of our allies who fear that strong encryption technology would inhibit their law enforcement capabilities.[17]

V. OBJECTIONS TO THE ESCROWED ENCRYPTION STANDARD

Response from the computer community was swift and harsh. An Internet-distributed article entitled "Jackboots on the Infobahn" authored by John Perry Barlow, co-founder and vice-chairman of the Electronic Frontier foundation, was released five days after the announcement, declaring, "Clipper is a last-ditch attempt by the United States, the last great power from the old Industrial Era, to establish imperial control over cyberspace."[18]

Strong criticism also came from mainstream sources. Indeed, EES produced a curious alliance of privacy advocates, business, and computer hackers as its foes. The New York

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[17] Ibid, para. 11

[18] Barlow, John Perry, "Jackboots on the Infobahn," Wired USA Ltd

Times described the plan as "unworkable and potentially intrusive."[19] A computer industry association, the Digital Privacy and Security Working Group, which includes Hewlett-Packard and Microsoft among its members, tentatively supported the Clipper Chip, but only as a "voluntary alternative to widely-available, commercially-accepted, encryption programs and products."[20] The organization was vehement in its opposition to encryption export controls.[21]

Some objections to EES are:

- Although the government promoted EES as a voluntary standard, opponents argued that the federal government's longterm plan had to include proscription of other encryption methods.[22] Barlow suggested that the voluntary program was the first step, intended to acclimate the public to the idea of trading privacy for law and order. Once that happens, and the impotence of the voluntary plan is evident, legislation prohibiting use of other strong encryption programs will be proposed. [23]
- Similarly, restricting use of the Skipjack algorithm to telephone conversation transmission was also seen as a temporary condition. After implementation, its use

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[19] "A Closer Look at Wiretapping," *The New York Times*, (editorial), June 12, 1994

[20] Letter from Digital Privacy and Security Working Group, sent to the White House Dec. 6, 1993, para. 3

[21] Ibid, para. 3

[22] John Perry Barlow, "A Plain Text on Crypto Policy," *Communications of the ACM*, Oct. 1993 (source text downloaded from Internet; no page numbers available)

[23] Barlow, *A Plain Text on Crypto Policy*, Ibid

must extend to computer data transmission to be effective.[24] *Capstone,* the version of the Clipper Chip developed by NIST for computer data encryption, also uses the Skipjack algorithm. EES opponents predicted that Capstone would be the second step in the government agenda.

- The existing export ban of strong encryption programs puts American manufacturers at unfair advantage and is an unconstitutional restraint of speech.
- The entire EES program is unfairly weighted in favor of law enforcement interests. The Skipjack algorithm was developed in secret, without benefit of review by the computer community. Industry cryptographic experts were excluded from the process and denied access to the algorithm, thus compromising industry confidence in the product. Moreover, the key escrow component of EES places both halves of the Skipjack key in the hands of the federal government, providing opportunity for abuse by law enforcement agencies.[25]

VI. CURRENT STATUS OF THE ESCROWED ENCRYPTION STANDARD

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[24] EPIC ALERT, a newsletter of the Electronic Privacy Information Center in Washington D.C. reports that FBI Director Louis Freeh suggested in October 1994 that if the Key-Escrow scheme is not widely adopted, he may seek legislation making it mandatory. The FBI confirmed his comments to reporters Brock Meeks and Stephen Levy. "The terms of encryption being a voluntary standard? Oh yea, definitely, I mean if five years form now we solve the access problem but what we are hearing is al encrypted I'll probably...be talking about that in a very important way...The objective is for us to get those conversations whether they are by an alligator clipped or...ones and zeros wherever they are, whatever they, I need them." (Reported in EPIC ALERT, Vol. 1.06, Oct. 29, 1994

[25] Hoffman, Ibid p.77

On July 20, 1994, in response to the vigorous objections and to an AT&T Bell Labs announcement that Skipjack could be altered to evade surveillance[26], the initiative was withdrawn for further study. Vice President Gore said that the administration would conduct a five-month study to develop a new encryption plan to satisfy both private industry and government agencies."[27] Although many critics of the plan said that EES had buckled under criticism, others say that the conflict between law enforcement interests and the security needs of business and private citizens is alive and well.[28] Mike Godwin, online counsel for the Electronic Frontier Foundation wrote in the May 1995 issue of Internet World, "Although the Clipper proposal as such is now dead in the water, the notion of so-called key-escrow encryption is very much alive."[29] Godwin says that the White House is committed to encryption standards that guarantee government access to communication.[30]

EES works in concert with the Digital Telephony Bill. Now that the bill has passed, privacy experts speculate that law enforcement will not be content with access to indecipherable messages and a revised version of EES is inevitable.[31]

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[26] John Markoff, "Flaw Discovered in Federal Plan for Wiretapping," *The New York Times*, June 2, 1994; Sect. A, 1:6

[27] "U.S. Scales Back Encryption Plan for Computers," *Wall Street Journal*, July 22, 1994 (Section B, Page 7, Column 1)

[28] Steven Vaughan-Nichols, "It's Alive!", *Internet*, Vol. 6 No. 2, Feb. 1995, pp. 62-65.

[29] Mike Godwin, "Crypto Conundrum," *Internet World*, May 1995, p. 103

[30] Godwin, Ibid., p.103

Congress has requested the National Research Council (NRC) conduct a broad review of cryptography. Although the completion date is 1996, a September 1994 report from the Office of Technology Assessment (OTA) predicted that "...if emplementation of the EES and related technologies continues at the current pace, key-escrow encryption may already be embedded in information systems before Congress can act on the NRC report."[32]

VII DISCUSSION

The following sections examine the Constitutional ramifications of existing encryption policy and of the Escrowed Encryption System.

First Amendment: Is the encryption software embargo a prior restraint of speech?

There are two recent situations involving encryption export. In early 1994, software engineers Bruce Schneier and Phil Karn requested and received permission to export a book. *Applied Cryptography: Protocols, Algorithms,and Source Code in C* (John Wiley and Sons, 1994). The book contains over 100 pages of source code for different cryptographic algorithms in a computer-scannable typeface. It has sold over 17,000 copies worldwide.[33]

Schneier and Karns' request to export identical information on computer disks was denied by the State Department.[34]

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[31] Vaughan-Nichols, Ibid., p. 65

[32] *Information Security and Privacy in Network Environments,* Office of Technology Assessment, Sept. 15, 1994, p.24

[33] EPIC ALERT, "State Dept: 1st Amendment Doesn't Apply to Disks", Vol. 1.06, Oct 29, 1994

This raises key questions: What is a data disk? What is disk-encoded data? How does disk-encoded data differ from the same information in print? The State Department has determined that the *Applied Cryptography* disk is legally controllable and outside the protection of the First Amendment. The Office of Defense Trade Controls told Karn that, because the data disk is partitioned and easily executable, it "is designated as a defense article under category XIII(b)(1) of the United States Munitions List.'"[35] A final response to his appeal was sent on October 7, 1994 from Martha C. Harris, Deputy Assistant Secretary for Export Controls. She said, "We have also reviewed your statement that the export of your disk is protected by the First Amendment to the Constitution, and have concluded that continued control over the export to such material is consistent with the protections of the First Amendment."[36]

The second case that calls into question the ban on cryptography export involves PGP (Pretty Good Privacy), a public-key encryption software package considered uncrackable by encryption experts.[37] It was developed by Philip Zimmermann, a software engineer specializing in cryptography and data security. The PGP case is particularly interesting because it underscores the paradigm shift introduced by computer-mediated communication. Zimmermann published the software on the Internet as freeware -- a free, downloadable software program -- to provide security protection for electronic mail. The Internet, though, knows no geographic boundaries, and the software was easily transmitted around the world. Zimmermann is undergoing a criminal investigation for exporting the product overseas without State Department clearance.[38]

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[34] John Schwartz, "Words for export--but not electrons," *Washington Post*, Oct 15 1994, Sec A, Page 3, Column 4

[35] May 11, 1994 letter to Philip Karn from Alan Suchinsky, cited in "Cygnus Cryptography Export Control Archives," latest update Dec.14, 1994

[36] Oct. 7, 1994 letter to Philip Karn from Martha C. Harris, cited in "Cygnus Cryptography Export Control Archives," latest update Dec. 14, 1994

Zimmermann's "munitions" product is a collection of data bytes designed to secure computer transmissions; the "export" consists of retrieval of those bytes over telephone cable (with no financial gain by the author). "I wrote PGP from information in the open literature, putting it into a convenient package that everyone can use in a desktop or palmtop computer," said Zimmermann at a congressional hearing. "Then I gave it away for free, for the good of our democracy. This could have popped up anywhere, and spread. Other people could have and would have done it. And are doing it. Again and again. All over the planet. This

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[37] Dr. Dorothy Denning, chairperson of the Computer Science Department at Georgetown University and a leading expert on cryptography and data security who favors the Skipjack, said that she didn't know of anyone who's been able to break the IDEA algorithm used by PGP. (Transcript of online debate between Dr. Dorothy Denning and John Perry Barlow over the Clipper Chip, from the "Time Online" forum of America On Line, Mar. 10, 1994)

[38] Testimony of Philip Zimmermann to U.S. House of Representatives Subcommittee for Economic Policy, Trade, and the environment, Introduction, Oct. 12, 1993 (Internet address www.quadralay.com/www/crypt/pgp)

technology belongs to everybody."[39]

Is the data disk the political pamphlet of the age of technology? If it is a publication differing from its printed version in format only, the State Department action is prior restraint[40]. The action demands strict scrutiny, the standard of review used when a fundamental right is significantly burdened by governmental action,[41] and clear evidence of a compelling government interest.

First Amendment: Would federal government prohibition of strong domestic encryption technology violate freedom of speech?

For the first time in the history of our Constitution we must examine the possibility that speech that is unintelligible to the government may be considered a national security threat. There is no legal precedent for the proscription of speech that is indecipherable to law enforcement agents. The concept seems so bizarre that it is important to assess its likelihood. Three facts support the possibility that the federal government is considering legislation of this nature.

An April, 1994 White House news release addressed the subject and did not rule it out.

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[39] Testimony of Philip Zimmermann, Ibid., Section II

[40] *Near v. Minnesota* 283 U.S. 697 (1931) citing Blackstone: "The liberty of the press...consists in laying no previous restraints upon publication." and *New York Times v. United States* 403 U.S. 713 (1971), "No law means no law" (Justice Black)

[41] Donald M. Gillmor et al, *Mass Communication Law* (St. Paul, New York, Los Angeles, San Francisco: West Publishing Company) 1990, p.932

The release responded to EES criticism and referred to the question of "legal remedies to restrict access to more powerful encryption devices" as a fundamental policy question "requiring further review." The Administration left the door open for mandated encryption methods. The press statement said, "The Administration is not saying, 'since encryption threatens the public safety and effective law enforcement, we will prohibit it outright' (as some countries have effectively done); nor is the U.S. saying that 'every American, as a matter of right, is entitled to an unbreakable commercial encryption product.'"[42]

Second, law enforcement agencies make a strong case for the regulation of encrypted speech. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes the use of court-ordered electronic surveillance for serious felony offenses. Sophisticated encryption techniques that do not allow government access impede law enforcement activities authorized by the Act. James Kallstrom, special agent for the FBI testified that "without law enforcement's ability to effectively execute court orders for electronic surveillance, the country would be unable to protect itself against foreign threats, terrorism, espionage, vilent crime, drug trafficking, kidnapping and other crimes."[43] The New York Times reported that FBI Director Louis Freeh said that "Americans must be willing to give up a degree of privacy, in exchange for safety and security, in an era of computer communications and digital telephone calls."[44]

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[42] White House Statement by the Press Secretary; "Questions and Answers about the Clinton Administration's Telecommunications Initiative," April 16, 1993;

[43] Statement of James K. Kallstrom, Special Agent in charge, special Operations Division, Federal Bureau of Investigation, Before the subcommittee on Technology, Environment and Aviation, U.S. House of Representatives, 103rd Congress, May 3, 1994, No. 113

Third, a recent report prepared by the Office of Technology Assessment (in response to a request by the Senate Committee on Governmental Affairs and the House Subcommittee on Telecommunications and Finance) commented on the Clinton administration position that there are no plans to make EES mandatory or to ban other forms of encryption. "Absent legislation these intentions are not binding for future administrations and also leave open the question of what will happen if the EES and related technologies do not prove acceptable to the private sector."[45]

Let us then assume that the U.S. government would support limiting encryption technology to that which allows their surveillance. Why is this significant?

Fred H. Cate, associate professor of law at Indiana University calls the Internet the "new battleground for fundamental First Amendment freedoms." Cate notes that the Clinton Administration's *Agenda for Action* is notable for the absence of any mention of the First Amendment. He observes that this omission is consistent with legislative and judicial interpretation of First Amendment rights regarding developing technology. "When confronted with restrictions on telegraph and telephone communications and on over-the-air radio and television broadcasting, the Court has assumed -- often with little explanation -- that 'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.'"[46]

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[44] John Markoff, "A Push for Surveillance Software," *The New York Times*, Feb. 28, 1994, D:3 p.1

[45] "Information Security and Privacy in Network Environments," Office of Technology Assessment, Sept. 15, 1995

New and traditional methods of communication have traditionally been viewed by the legislative and judicial branches of the government with suspicion. Before 1965, unsealed mail that was thought to be Communist propaganda from foreign countries was detained by the U.S. Post Office (Lamont v. Postmaster General, 381 U.S. 301). In the 1920s the Post Office employed its power to deny second class mailing rates to certain publications; it effectively limited distribution of socialist publications (U.S. ex. rel. Milwaukee Social Democratic Publication Co. v. Burleson, 255 U.S. 407 1921). A strong case for law and order could be used to justify similar government restraints on computer-mediated communications.[47]

Fifth Amendment: Would the involuntary use of government-accessible encryption keys violate the right to refuse to provide self-incriminating evidence?

"No person...shall be compelled in any criminal case to be a witness against himself."

If the only encryption device available to private citizens is one that allows access by the government, Barlow asks, isn't this the equivalent of "being forced to give up your secrets in advance"? Access to electronically-transmitted transactions, financial and otherwise, is access to information placed there by the individual that, if volunteered, could serve to incriminate him.

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[46] Fred H. Cate, "A Law Antecedent and Paramount," *Federal Communications Law Journal*, Dec. 1994, Vol. 47, No. 2 [citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)]

[47] John Perry Barlow, "A Plain Text on Crypto Policy," *Communications for the ACM*, Oct. 1993

However, precedence shows that Court interpretation of the Fifth Amendment has varied with circumstance. Mark Berger notes that contemporary Supreme Court decisions have resulted in restrictive interpretations of the Fifth Amendment, with balancing of state and individual interests in the state's favor.[48] In *Schmerber v. California*[49] the Court ruled that Fifth Amendment protection extended only to testimonial evidence, a narrower view than before. The Court's changing position is especially evident in its regard of personal documents. In *Boyd v. United States*[50] the Court recognized and established a sphere of privacy for personal documents that was protected by the conjoined freedoms of the Fourth and Fifth Amendments. But in *Andreson v. Maryland*[51] the Court asserted that personal papers may indeed by searched if the warrant procedure has been followed. Berger observes that:

> It seems strange that during an era in which individual privacy was less intruded upon and less in need of protection, the Fifth Amendment served as an impenetrable shield guarding private documents. Now that our society has become crowded and intrusive, the Fifth Amendment allows personal papers to be obtained by the government despite

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[48] Mark Berger, *Taking the Fifth* (Lexington, Massachusetts and Toronto: Lexington Books) 1980, p.228

[49] 384 U.S. 757 (1966)

[50] 116 U.S. 616 (1886)

[51] 427 U.S. 463 (1976)

the need for greater protection of individual privacy."[52]

There is other evidence that computer transactions could be considered fair game by the Court for law enforcement purposes. State and federal agencies use computer matching programs to compare two or more government databases in the identification of fraud and abuse of welfare and social service programs. The matched data is compiled from information provided by recipients of the social services in question. The Computer Matching and Privacy Protection Act of 1988[53] amends the Privacy Act of 1974 and provides the administrative authority to match the databases.

Fourth Amendment: Would judicial and legal interpretation of the Fourth Amendment respect the privacy of data contained within virtual walls erected by strong encryption?

Precedent argues against the right to privacy. Until 1967, interpretation of the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...") was literal; violation required physical invasion. In *Olmstead v. U.S.*[54] the Court ruled that wiretapping did not invade physical property (the tapped lines were on the outside of the building) and Fourth Amendment rights were not violated "unless there had been an official search and seizure of [his person, papers, or effects] or an actual physical invasion of his house or 'curtilage' for the purpose of making a seizure."[55] The Court also stated that anyone who installs a telephone *intends* "to project his voice to those quite outside" his curtilage; the wire and messages on the wire fall outside of his fourth amendment protection."[56]

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[52] Berger, Ibid p.230

[53] P.L. 100-503, 102 Stat. 2507, Oct. 18, 1988

[54] 316 U.S. 129 (1942)

Subsequent Supreme Court cases affirmed the physical invasion requirement. In *Goldman v. U.S.*[57] the Supreme Court found that a device that amplifies voice vibrations for the purpose of overhearing conversation had not violated Fourth Amendment rights because federal agents had not physically entered the defendent's office. In *Silverman v. U.S.*[58] when officers used the voice-transmitting properties of a heating duct to overhear the defendent's conversations the Court ruled that the use of the heating duct was an unconstitutional physical invasion.[59]

In *Katz v. U.S.*[60] the Court recognized the intrusive nature of electronic surveillance and repudiated *Olmstead*. The Court said in *Katz* that "the Fourth Amendment protects people, not places"[61] when a listening device placed by the FBI on top of a phone booth (but which did not penetrate the structure) was found in violation of the Fourth Amendment. The

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[55] Id at 466

[56] *Id.* at 465

[57] 316 U.S. 129 (1942)

[58] 365 U.S. 505 (1961)

[59] *Id.* 1t 511

[60] 389 U.S. (1967)

[61] 389 U.S. 351

Court said that an individual who places a call from a telephone booth "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[62]

In 1968 the Wiretapping Act[63] was passed in response to *Katz*, prohibiting the interception of wire or oral communications without a court order. It was amended in 1986 by the Electronic Communications Privacy Act, Title I of which protects against unauthorized interception of electronic communicaiton. This act created a new criminal offense of unauthorized access to electronic communications and transactional records.

However, nine years after *Katz* the Supreme Court retreated from the established principle and decided that when police use a "pen register" and the assistance of the phone company to record all numbers dialed from a phone and the times of dialing, no search occurs and, consequently, no warrant is necessary. The Court found no expectation of privacy in the numbers dialed because the numbers are recorded by the telephone company for billing purposes.[64] It is significant that telephone numbers -- *data* -- are not considered private information. The disregard for numbers as private information protected by constitutional *penumbras* may foretell the level of judicial respect to be accorded bits and bytes of computer information.

Robert M. Evans, Jr. cited two cases illustrating the Supreme Court's evolution away from *Katz* in his 1988 analysis of privacy and technology.[65] In *California v. Ciraolo*[66] and *Dow Chemical Co. v. U.S.*[67] federal agents used aerial observation to collect information to show probable cause for a search warrant (*Ciraolo)* and to conduct an EPA inspection *(Dow)*. In each case the Court failed to apply the principle of protecting "people, not places" and, in the case of *Dow*, it didn't even cite *Katz*.

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[62] Ibid at 352

[63] 18 U.S.L. § 2510 et sequ.

[64] *Smith v. Maryland* (442 U.S. at 746-747)

Evans inferred from both decisions that the Court has established a two-part test for determining "an objectively reasonable expectation of privacy." The first part of the test has to do with common use of the surveillance method -- whether the method is generally available to the public or known to the public (i.e., aerial surveillance). The second part of the test returns to the question of literal, physical intrusion into the complainant's private area.[68]

In order to maintain the principle of the Fourth Amendment in its application to cyberspace, it will be necessary to discard the requirement of physical intrusion and return to a Constitution that "protects people, not places." Cyberspace is less a place than a concept but its contents are indeed personal and private. Laurence Tribe sees the challenges of our new technology as an opportunity to examine the core values of the Constitution outside of

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[65] Robert M. Evans, Jr., "Reasonable Expectations of Privacy and High Technology Surveillance: The Impact of *California v. Ciraolo* and *Dow Chemical v. U.S.* on Title III of the Omnibus Crime Control and Safe Streets Act, *Washington University Law Quarterly*, Vol. 66, 1988, pp.111-133

[66] 476 U.S. 207 (1986)

[67] 476 U.S. 227 (1986)

[68] Robert M. Evans, Jr., pp. 123-124

"culturally-imposed categories."[69] In this context Tribe asserts that the Constitution's deeply-held standards, the norms that respect the rights and dignity of the human spirit, should not "vary with accidents of technology."[70]

But experience proves otherwise. Judicial interpretation of these core values have fluctuated with the "accidents of technology," at least until that technology is understood by and assimilated into popular culture.

Conclusion

Perhaps, though, it isn't enough to wait for principles to re-emerge. George Trubow describes "information law" as a legal response to the paradigmatic changes of technology. Information law addresses issues of privacy, the public's "right to know," free speech and press, and state security interests and involves a composite of concepts from constitutional and statutory law to torts, criminal law, copyright and contracts. Trubow describes why the vast resources of information technology make this approach to law necessary:

> A natural conflict often exists between those who want to receive information and those who want to sequester it; the desire seems to depend upon one's role or interest at the moment. Each of us wants information about others, yet we desire to keep information concerning ourselves private, except when self-disclosure suits our purposes. The desire to control personal information may be the heart of privacy, though surely it

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[69] Laurence H. Tribe, *The Constitution in Cyberspace*, Keynote address at the First Conference on Computers, Freedom and Privacy, 1991

[70] Tribe, Ibid (no page numbers, obtained from the CPSR Privacy/Information Archive, Computer Professionals for Social Responsibility)

conflicts with public curiosity.[71]

Many of the seemingly disparate elements of information law are linked by privacy and the conflicting interests of individual and state. Privacy, whether protected by an eight-foot concrete wall or a sophisticated code, is a legally-recognized human right. Restraint of speech, even speech that is magnetically imprinted on a three-inch square disk, violates the Constitution. The tension between government interests and individual rights is constant and predictable, even when it's disguised as protection from dangerous external forces.

Laurence Tribe has proposed a 27th Amendment to the Constitution that strips away the "technological transformations" of contemporary culture and restores the focus to core values. It reads:

> This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property with due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.[72]

Is a measure as drastic as a constitutional amendment necessary? Perhaps. History demonstrates that emerging technology is an easy target for government interests. Public fears of crime and terrorism weaken citizens' objections to the erosion of their rights, especially when the erosion is in the name of law and order. Yet it is at precisely that moment of vulnerability, when public fear intersects with the state's organic need to expand and control, that bedrock constitutional principle is needed.

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[71] George B. Trubow, "Information Law Overview," *The John Marshall Law Review,* 1985, Vol.18, pp. 821-822

[72] Tribe, Ibid

BIBLIOGRAPHY

Articles

Robert M. Evans, Jr., "Reasonable Expectations of Privacy and High Technology Surveillance: The Impact of *California v. Ciraolo and Dow Chemical v. U.S.* on Title III of the Omnibus Crime Control and Safe Streets Act, *Washington University Law Quarterly,* Vol. 66, 1988, pp. 111-133

Mike Godwin, "Crypto Conundrum," *Internet World,* Vol. 6, No. 5, May 1995, pp. 102-103

Edwin B. Heinlein, "Communications, Security, Privacy and the Law," *Computers and Security,* April 1994, pp. 119-121

Lance J. Hoffman, "Who holds cryptographic keys?" *Computer,* Nov. 1993

John Markoff, "A Push for Surveillance Software," *The New York Times,* Feb. 29, 1994, D:3, p.1

John Markoff, "Flaw Discovered in Federal Plan for Wiretapping," *The New York Times,* June 2, 1994, A:11, p.6

John Schwartz, "Words for export -- but not electrons," *Washington Post,* Oct. 15 1994

George B. Trubow, "Information Law Overview," *The John Marshall Law Review,* 1985, Vol. 18, pp. 821-822

George B. Trubow, "The Fourth Amendment, Privacy, and Modern Technology: A Time for Reassessment," *A Time for Choices* (Denver, Colorado: The First Amendment Congress) 1991

Steven Vaughan-Nichols, "It's Alive!" *Internet,* Vol.6 No.2, Feb. 1995

"A Closer Look at Wiretapping," *The New York Times,* June 12, 1994

"U.S. Scales Back Encryption Plan for Computers," *Wall Street Journal,* July 22, 1994, B:1, p.7

Books

Mark Berger, *Taking the Fifth* (Lexington, Mass. and Toronto: Lexington Books) 1980

Mark Gibbs and Richard Smith, *Navigating the Internet* (Carmel, Indiana: Sams Publishing) 1993

William Gibson, *Neuromancer* (New York: Ace Books) 1984

Donald M. Gillmor, Jerome A. Barron, Todd F. Simon, Herbert A. Terry, *Mass Communication Law,* Fifth Ed., (St. Paul, New York, Los Angeles, San Francisco: West Publishing Company) 1990

Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, Massachusetts and London: Harvard University Press) 1983

Samuel Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review*, Vol 4, 1890

Online References

Eric Arnum, "Correlation of GNP/GDP to Number of Internet Hosts in July, 1994"
(access: http://info.isoc.org/charts/host/grp.test)

John Perry Barlow, "A Plain Text on Crypto Policy," *Communications of the ACM*, Oct. 1993

John Perry Barlow, "Jackboots on the Infobahn," *Wired*, Feb. 1994, Vol. 2.04

Fred H. Cate, "A Law Antecedent and Paramount," *Federal Communications Law Journal*, Indiana University School of Law, Dec. 1994, Vol. 47, No.2

Laurence H. Tribe, *The Constitution in Cyberspace*, Keynote address at the First Conference on Computers, Freedom and Privacy, 1991
(Access: Privacy/Information Archive, Computer Professionals for Social Responsibility)

"EFF Analysis of Vice President Gore's Letter on Cryptography Policy," July 22, 1994
(access: http://www.eff.org/pub/EFF/Policy/Crypto/Clipper/gore_clipper_retreat)

Letter from Alan Suchinsky to Philip Karn, May 11 1994
(access: ftp.cygnus.com/pub/export/applied-floppy-appeal-response)

Letter from Martha C. Harris to Philip Karn, Oct. 7 1994
(access: ftp://ftp.cygnus.com/pub/export/applied-floppy-appeal-response2)

Letter from Digital Privacy and Security Working Group to the White House, Dec. 6, 1993

"MIDS Press Release: New Data on the Size of the Internet and the Matrix," Matrix Inforamtion and Delivery Services
(assess: http://www.mids.org/mids/pressbig.html)

White House Press Release , Office of the Press Secretary, Feb. 4, 1994
(access: ftp//ftp.eff.org/pub/EFF/Policy/Crypto/Clipper/wh_press_secy.statement)

White House Statement by the Press Secretary, "Fact Sheet: Public Encryption Management," Apr. 16, 1993
(access: http://cpsr.org/cpsr/privacy/crypto/clipper/white_house_crypto_plan.factshe)

White House Statement by the Press Secretary, "Questions and Answers about the Clinton Administration's Telecommunications Initiative," Apr. 16, 1993
(access: ftp://ftp.eff.org/pub EFF/Policy/Crypto/Clipper/crypto.q-a)

"Time Online," transcript of online debate from America OnLine, Mar.10, 1994
(access: http://www.eff.org/pub/EFF/Policy/crypto/clipper/barlow_v_denning.transcript)

"FBI Director May Ask for Mandatory Key Escrow Legislation" and "State Dept: 1st Amendment doesn't apply to disks," *EPIC ALERT*, Vol 1.06, Oct. 29 1994

National Information Infrastructure "Agenda for Action," Sept. 15, 1993

"National Security vs. personal privacy," EDGE: Work-Group Computing Report, Sept.5 1994

Information Security and Privacy in Network Environments, Office of Technology Assessment, Spet. 15 1994 (Cygnus Export Control Archives, public FTP site)

Testimony of Philip Zimmermann to U.S. House of Representatives Subcommittee for Economic Policy, Trade and the Environment, Oct. 12, 1993

Other

"FBI Advanced Communications Technologies Pose Wiretapping Challenges," United States General Accounting Office, Briefing Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives (GAO/IMTEC-92-68BR) July 17, 1992

Hearing before the Subcommittee on Technology, Environment and Aviation of the Committee on Science, Space, and Technology, U.S. House of Representatives, 103d Congress, May 3 1994

"Defending Secrets, Sharing Data: New Locks and Keys for Electronic Information," U.S. Congress, Office of Technology Assessment, OTA-CIT-310, Oct. 1987

Legal Citations

Andreson v. Maryland, 427 U.S. 463 (1976)

Boyd v. United States, 116 U.S. 616 (1886)

California v. Ciraolo, 476 U.S. 207 (1986)

Dow Chemical Co. v. U.S., 476 U.S. 227 (1986)

Goldman v. United States, 316 U.S. 129 (1942)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Katz v. U.S., 389 U.S. 351 (1967)

Lamont v. Postmaster General, 381 U.S. 301 (1965)

Near v. Minnesota, 283 U.S. 697 (1931)

New York Times v. United States, 403 U.S. 713 (1971)

Olmstead v. United States, 316 U.S. 129 (1942)

Schmerber v. California, 384 U.S. 757 (1966)

Silverman v. U.S. 365, U.S. 505 (1961)

Smith v. Maryland, U.S. 422

Texas v. Johnson, 491 U.S. 397 (1989)

U.S. ex rel. Milwaukee Social Democratic Publication Co. v. Burleson, 255 U.S. 407 (1921)

Exploring the Link Between Source Credibility and Reputational Harm: Effects of Publication Type on Belief of Potentially Defamatory Statements

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Paper submitted to the Law Division
AEJMC National Convention
Washington D.C.
August 1995

Exploring the Link Between Source Credibility and Reputational Harm: Effects of Publication Type on Belief of Potentially Defamatory Statements

The concept of source credibility is as old as the story of the boy who cried wolf. We have known for generations that those who lie repeatedly and without remorse soon find themselves unable to inspire any belief at all in their assertions, even when their assertions happen to be true. Yet American libel law only recently has begun to speculate that people might routinely apply this widespread bit of common sense to potentially defamatory statements appearing in the mass media. Libel law first recognized that source credibility might affect reputational harm while distinguishing between erroneous assertions of fact and constitutionally protected opinions. It now may have begun considering the relationship outside the context of opinion.

Unfortunately, courts are fashioning this link between source credibility and reputational harm largely without the benefit of sound, scientific research into the nature of such a link. This paper seeks to help initiate such research by employing a field study to examine the likelihood that the type of publication in which a potentially defamatory statement appears significantly affects the credibility ascribed to the statement.

Review of Relevant Literature and Case Law

Reputational damage forms the very essence of libel[1] and springs from public-opinion-based factors such as the public's estimation of the plaintiff[2] and the plaintiff's standing in the community.[3] Public opinion and the process by which it develops amount to highly complex concepts that defy explication within the scope of this paper. Rather than attempting such an explication, this paper focuses instead on an essential if not initial step in the public opinion process: individual-level decisions regarding whether to accept as true or reject as false information presented in the mass media.

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[1] Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971).

A 1951 study by Carl Hovland and Walter Weiss produced some of the earliest scientific evidence of a link between source credibility and such individual-level decisions about mass media messages.[4] Hovland and Weiss presented identical articles on four topics to students enrolled in an advanced history course at Yale University. Each article was presented to some of the students as having originated from a low-credibility source such as *Pravda* or a newspaper columnist known for "rightist" leanings and presented to the remaining students as having originated from a high-credibility source such as *The New England Journal of Biology and Medicine* or renowned scientist Robert J. Oppenheimer. Results indicated subjects changed their opinions in the direction advocated by the articles to a significantly greater degree when the articles were attributed to high-credibility sources than when the articles were attributed to low-credibility sources. Interestingly, Hovland and Weiss also found that, after a period of time, there was a decrease in the extent to which subjects agreed with opinions advocated by trustworthy sources but an increase in the extent to which subjects agreed with opinions advocated by untrustworthy sources. They explained this so-called "sleeper effect" by suggesting that subjects, over time, forgot the source of the opinion. As a result, subjects who initially agreed with an opinion chiefly because they trusted its source showed less agreement with the opinion once they had forgotten the source. Likewise, subjects who initially disagreed with an opinion chiefly because the distrusted its source showed more agreement with the opinion once they had forgotten the source.

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[2] RESTATEMENT SECOND OF TORTS § 599 (1977).

[3] Gertz v. Robert Welch, Inc., 418 U.S. 323,350 (1974).

[4] Carl I. Hovland and Walter Weiss, *The Influence of Source Credibility on Communication Effectiveness*, 15 PUB. OPINION Q. 635 (1951).

Later researchers identified additional factors that played a role in individual acceptance of messages. Elaine Alster et al., for example, documented that sources ordinarily low in credibility increased their persuasive power when they advocated positions contrary to their own interests.[5] Meanwhile, Donald F. Roberts et al. found that the media's ascribed credibility on a given issue drops as the issue grows more controversial.[6]

A 1987 article by Jeremy Cohen and Albert C. Gunther introduced the possibility of a link between source credibility and libel law and called for scientific exploration of the relationship.[7] Citing the work of Hovland and Weiss, they wrote, "Such findings suggest differential effects of a message when it appears in *The New York Times* versus supermarket tabloids."[8] Later in the same article, they wrote, "[R]esearch in communication brings us to a point at which we may begin to operate with more precision to identify what we mean by damage to reputation, and to identify the circumstances under which a communication may be reliably held to account for damage to reputation."[9] Cohen and Gunther's challenge has gone largely unmet, although several scholars have since joined them in their call for experimental examination of assumptions underlying libel law. "Assessment of reputational harm has become fertile new ground for both constitutional analysis and social science research," wrote David McCraw in 1991.[10] William Haskins argued that the courts have failed to square their views of the communication process with the findings of modern social science research,[11] and Clay Calvert noted that a recent Ninth Circuit Court of Appeals opinion perhaps had opened the door to factoring source credibility into defamation cases.[12] In the opinion, handed down as part of the high-profile case *Masson v. New Yorker Magazine*, Judge Alex Kozinski wrote, "The harm inflicted by a misstatement in a publication known for scrupulously investigating the accuracy of its stories can be far more serious than a similar misstatement in a publication not known to do so."[13] Calvert contended that at the heart of the statement lay the "fundamental notion that certain classes of publications are capable of causing less -- if any -- damage to a person's reputation. Kozinski's observation suggests that classifications and distinctions can be made among media defendants along the dimension of *credibility*."[14]

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[5] Elaine Alster, Elliot Aronson and Darcy Abrahams, *On Increasing the Persuasiveness of a Low Prestige Communicator*, 2 J. OF EXPERIMENTAL SOC. PSYCHOL. 325 (1966).

[6] Donald F. Roberts and Aimee Dorr Leifer, *Actions Speak Louder Than Words -- Sometimes*, 1 HUM. COMM. RES. 257 (1975).

[7] Jeremy Cohen and Albert C. Gunther, *Libel as Communication Phenomena*, COMM. & L., Oct. 1987, at 9.

[8] *Id.* at 23.

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[9] *Id.* at 30.

[10] David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 82 (1991).

[11] William A. Haskins, *Freedom of Speech: A Review Based Upon Analytical Communication Models*, COMM. & L., June 1986, at 37.

[12] Clay Calvert, Some Lessons About Libel Law and Communication Science From the Long, Strange Trip of Jeffrey Masson and the Case of the Fabricated Quotations (1994) (unpublished manuscript presented to the 1994 AEJMC Annual Convention in Atlanta, Ga.).

[13] Masson v. The New Yorker Magazine, Inc. 960 F.2d 896, 901-902 (9th Cir. 1992).

In fact, courts have recognized at least since the 1980s that some publications are more inclined toward factual reporting than others. The acknowledgment has arisen primarily when courts have sought to distinguish constitutionally protected opinions from unprotected, defamatory falsehoods. For example, the U.S. Court of Appeals for the District of Columbia ruled in 1984 that "Some types of writing or speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact. It is one thing to be assailed as a corrupt public official by a soapbox orator and quite another to be labelled corrupt in a research monograph detailing the causes and cures of corruption in public service."[15] Similarly, the U.S. Court of Appeals for the Eighth Circuit stated that national news magazines like *Newsweek* regularly employ language that alerts the reader to expect more opinion than what the reader might expect to find in a daily newspaper.[16] The U.S. District Court for the Northern District of Illinois frankly noted that readers of *Playboy* were "fairly on notice to expect something other than fact from the outset, indeed from the front cover."[17] Readers also could expect little purely factual material in a company news letter, according to the U.S. Court of Appeals for the Fourth Circuit.[18]

Still, at least some reason exists to suspect the general public draws no such distinctions regarding the credibility of different types of media. A nationwide poll the American Society of Newspaper Editors commissioned in 1985 found that three-fourths of all adults had some problem with the media's credibility, and one-fifth of all adults deeply distrusted their news media.[19] In an apparently inconsistent finding, a contemporary poll conducted for Times-Mirror reported that the public generally gave the media high marks on believability.[20] Cecilie Gaziano, project director and principal analyst for the ASNE poll, conceded that the results varied but attributed at least some of the inconsistency to differences in measurement techniques.[21] Given the inconclusiveness, however, the possibility exists that the general public considers all media -- from the *National Enquirer* to *The New York Times* -- equally untrustworthy.

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[14] Calvert, *supra* note 12, at 20.

[15] Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984).

[16] Janklow v. Newsweek, Inc. 788 F.2d 1300, 1303-1304 (8th Cir. 1986).

[17] Saenz v. Playboy Enterprises, 653 F.Supp. 552, 565 (N.D. Ill. 1987).

[18] Potomac Valve & Fitting Inc. v. Crawford Fitting Company, 829 F.2d 1280 (4th Cir. 1987).

A review of relevant literature and case law, therefore, leads to at least three conclusions: First, calls for scientific exploration of a relationship between source credibility and reputational harm have gone largely unheeded. Second, courts may be moving toward establishing such a link unaided by the kind of knowledge scientific inquiry could provide. Finally, the link's existence is neither a foregone conclusion nor a total improbability. Taken together, these conclusions point out both the need for and the feasibility of an investigation into the relationship between source credibility and reputational harm.

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[19] American Society of Newspaper Editors, *Newspaper Credibility: Building Reader Trust* 13 (Report on poll conducted by MORI Research, Inc., P.O. Box 17004, Washington, D.C. 20041, 1985).

[20] Times Mirror, *The People and the Press* 4 (Poll conducted by Gallup in collaboration with Michael J. Robinson of George Washington University, Los Angeles, 1986).

[21] Cecilie Gaziano, *How Credible is the Credibility Crisis?* 65 JOURNALISM Q. 267, 273 (1988).

Hypotheses

This paper attempts to provide such an investigation by examining the following two hypotheses:

1. Potentially defamatory statements appearing in some types of publications are perceived as significantly more truthful than such statements appearing in other types of publications.

2. People familiar with a given publication consider such statements appearing in the publication significantly more truthful than do people who are not familiar with the publication.

The publication types and the differences between them implied by the first hypothesis are derived from suggestions in the literature and case law. As has been shown, Cohen and Gunther proposed a contrast between national newspapers like *The New York Times* and supermarket tabloids. Courts, meanwhile, have posited that national news magazines like *Newsweek* and adult magazines like *Playboy* might enjoy less credibility because of their proportionally higher opinion or fantasy content, respectively, and that a national magazine like *The New Yorker* might enjoy more credibility because of its reputation for checking facts. The second hypotheses derives, as will be shown, from a methodological need to distinguish between subjects who had at least looked through the publication about which they had been asked and subjects who had not. Its direction is based on the logical assumption that people tend to read publications they consider truthful.

Method

Six hundred and seventy-five people age 18 or older were chosen at random from the North Carolina population to take part in a field study conducted Nov. 6 through Nov. 10, 1994.[22] Each subject was asked how truthful he or she thought unfavorable statements about well-known people were when such statements appeared in publications like one of 10 different publication examples.[23] Subjects could choose "Highly truthful," "Moderately truthful," "A little truthful," or "Not at all truthful," in addition to the volunteered responses "It depends," "Don't know," or "No answer." A random process built into the computer program that callers used to conduct the interviews selected the publication example about which each respondent was asked. Additionally, respondents were asked to indicate how often they had read publications like the one about which they had been asked: "Regularly," "Occasionally," "Once or twice," or "Never."[24] The ten publication examples were *The National Enquirer*, *The Globe*, *The New York Times*, *The Washington Post*, *Time*, *Newsweek*, *The New Yorker Magazine*, *Atlantic Monthly*, *Playboy*, and *Penthouse*. The data were then analyzed using statistical procedures including T-tests, a two-way analysis of variance, and a post-hoc multiple comparison procedure known as the Tukey-Kramer method.

Meanwhile, in an experiment conducted as a separate test of the first hypotheses, four blocks of text were fabricated, each making a defamatory assertion about a fictitious individual. Each text block was typeset in a different font and made to appear as if it were a story excerpt clipped from a publication. Appendix A contains an example of each excerpt as it appeared in the experiment. Additionally, four publications were chosen from among those mentioned in the case law: *The National Enquirer, Playboy, The New Yorker Magazine,* and *The New York Times.* Each of the excerpts was then paired with each of the publications by photocopying one of the excerpts onto a sheet of paper at the top of which a fictitious citation to one of the publications had been typed.[25] Sixteen unique pairings were possible.

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[22] The field study was embedded within a public opinion poll conducted by telephone using a random-digit-dialing procedure and resulting in a margin of error of plus-or-minus four percentage points at the 95 percent confidence level.

[23] The actual wording of the question was as follows: "Many stories appearing in the media say unfavorable things about well-known people. How truthful do you think such stories are when they appear in ... (publication example)."

[24] The actual wording of the question was as follows: "Which of the following best describes how often you read ... (publication example)."

A seven-item questionnaire was then produced for each of the 16 publication-excerpt combinations. One of the seven questions asked subjects to indicate, on a seven-point scale, how likely they thought it was that the person referred to in the excerpt actually had done what the excerpt said the person had done. A one on this "believability" scale represented "Not at all likely," and a seven on the scale represented "Highly likely." The remaining six questions were dummy questions designed to disguise the true purpose of the experiment.

The publication-excerpt sheets and the questionnaires were then compiled into 24 unique booklets. Table 1 indicates the pairings in each booklet. The order in which the stories were presented within each booklet was systematically rotated as well. The rotation and random pairing were used to neutralize any effects that might have resulted from the way in which the excerpts and publications were paired or from the order in which they were presented. The set of 24 booklets was then duplicated once to yield 48 booklets. Each of the 48 booklets was then assigned at random to one of 48 graduate and undergraduate students recruited as subjects for what they were told was a study on the effects of different writing styles. Each student participated in exchange for extra credit in a course.

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[25] The citation appeared after the word "Source," and the word "Source" was underlined and succeeded by a colon. The citation itself was set in italic type.

Table 1:
Publication-excerpt pairings

Book#	Story 1	Story 2	Story 3	Story 4
1	Nat. Enq.	New Yorker	Playboy	NYT
2	NYT	Nat. Enq.	New Yorker	Playboy
3	Playboy	NYT	Nat. Enq.	New Yorker
4	New Yorker	Playboy	NYT	Nat. Enq.
5	Nat. Enq.	New Yorker	NYT	Playboy
6	Playboy	Nat. Enq.	New Yorker	NYT
7	NYT	Playboy	Nat. Enq.	New Yorker
8	New Yorker	NYT	Playboy	Nat. Enq.
9	Nat. Enq.	Playboy	New Yorker	NYT
10	NYT	Nat. Enq.	Playboy	New Yorker
11	New Yorker	NYT	Nat. Enq.	Playboy
12	Playboy	New Yorker	NYT	Nat. Enq.
13	New Yorker	Nat. Enq.	Playboy	NYT
14	NYT	New Yorker	Nat. Enq.	Playboy
15	Playboy	NYT	New Yorker	Nat. Enq.
16	Nat. Enq.	Playboy	NYT	New Yorker
17	NYT	New Yorker	Playboy	Nat. Enq.
18	Nat. Enq.	NYT	New Yorker	Playboy
19	Playboy	Nat. Enq.	NYT	New Yorker
20	New Yorker	Playboy	Nat. Enq.	NYT
21	NYT	Playboy	New Yorker	Nat. Enq.
22	Nat. Enq.	NYT	Playboy	New Yorker
23	New Yorker	Nat. Enq.	NYT	Playboy
24	Playboy	New Yorker	Nat. Enq.	NYT

The results were then analyzed using a variety of statistical procedures including repeated-measures analysis of variance and a post-hoc multiple comparison procedure known as Tukey's HSD.

All procedures in both tests were computed wholly or in part by the SPSS/PC+ computer statistics program. The procedures and their results are summarized in the next section. The field study will be discussed first, followed by the experiment.

Analysis & Results

Field study

First, responses given by subjects asked about *The National Enquirer* and *The Globe* were combined to represent the credibility ascribed to unfavorable statements about well-known people in all supermarket tabloid newspapers. Similarly, *The New York Times* and *The Washington Post* scores were combined to represent national newspapers; *Time* and *Newsweek* scores were combined to represent national news magazines; *The New Yorker Magazine* and *Atlantic Monthly* scores were combined to represent national, general-interest magazines; and *Playboy* and *Penthouse* scores were combined to represent national adult magazines. Additionally, the credibility scale was reversed to aid interpretation. According to the credibility question's format, a "1" indicated "Highly truthful" and a "4" indicated "Not at all truthful." Reversing the scale meant a "1" represented "Not at all truthful" and a "4" represented "Highly truthful." Thus a larger credibility value in all of the following tables indicates a high credibility rating, and a smaller credibility value indicates a low credibility rating. The reversal had no effect on the outcome of the statistical procedures performed.

Subjects also were divided according to how familiar they said they were with publications like the one about which they had been asked. Those who said they had read such publications regularly, occasionally, or once or twice were judged to have at least some familiarity with the kinds of publications about which they had been asked. Those who said they had never read publications like the one about which they had been asked were judged to have no such familiarity. The distinction was made to help keep the comparison fair; those who at least had looked through the publication about which they had been asked were considered more qualified to judge the publication's trustworthiness than those who had never done so.

Eighty-six subjects answered either "Don't know" or "It depends" to the question about credibility or answered "Don't know" to the question about reading frequency. These subjects were omitted from the analysis. Including them, it was decided, would have amounted to assigning them an opinion when they in fact did not have one.

Next, T-tests were computed as indicators of the study's measurement reliability. Briefly, a T-test compares the mean of the scores in one group with the mean of the scores in another group to determine whether the two means differ enough to indicate a similar difference in the population from which scores in the two groups were drawn. In the study at hand, if the two publications said to represent each publication category on the study's credibility scale did in fact represent the category, one logically could expect the average credibility score for each publication to be roughly the same as the other. Thus a T-test comparing the average credibility scores of each publication pair should yield values nonsignificant at the .01[26] probability level, indicating that the means are not different enough to suggest a similar difference in the overall population. Table 2 summarizes the results of T-tests performed on each of the publication pairs.

Table 2
T-test results

	National Enquirer/ Globe	New York Times/ Washington Post	Newsweek/ Time	New Yorker/ Atlantic Monthly	Playboy/ Penthouse
Group means	Nat. Enq: 1.549 Globe: 1.500	NYT: 2.587 W. Post: 2.523	Time: 2.629 Newsweek: 2.561	At. Monthly: 2.426 N. Yorker: 2.328	Playboy: 2.205 Penthouse: 1.933
Difference in group means	.049	.064	.068	.098	.272
Probability of resulting T value	p=.743 (Non-sig.)	p=.688 (Non-sig.)	p=.590 (Non-sig.)	p=.465 (Non-sig.)	p=.032 (Non-sig.)

As the table indicates, each of the T-tests proved non-significant, indicating that the publications within each pair received credibility ratings similar to each other. Thus it is reasonable to conclude that the study's measurement technique was sufficiently reliable.

Each of the 589 subjects was then placed in one of ten groups, depending on the publication about which the subject had been asked and on the subject's reported familiarity with the publication. The italicized numbers in Table 3 show the average credibility score provided by each group's subjects and, in parentheses, the number of subjects in each group. Similar figures are provided for each row total and each column total.[27]

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[26] *See* DENNIS E. HINKLE & WILLIAM WIERSMA & STEPHEN G. JURS, APPLIED STATISTICS FOR THE BEHAVIORAL SCIENCES 357-358. (3d ed. 1994). A T-test typically is performed with a probability level of .05. However, performing five independent T-tests each at the .05 level of probability would result in an unacceptably high experiment-wise error rate of .23. Therefore, the probability level for each T-test was set at .01. Doing so yielded an acceptable .05 experiment-wise error rate, according to the formula $1-(1-\alpha)^c = \alpha_E$, where α = the probability level of each T-test, c = the number of T-tests, and α_E = the experiment-wise error rate.

Table 3

Average credibility scores
and per-cell totals

	Super-market Tabloids	Adult Mags.	National Gen. Interest Mags.	National Newspapers	National News Mags.	Row Total
Familiar with publication	*1.67* *(51)*	*2.32* *(70)*	*2.43* *(65)*	*2.70* *(60)*	*2.67* *(115)*	2.42 (361)
Not familiar with publication	*1.29* *(33)*	*1.77* *(65)*	*2.33* *(67)*	*2.36* *(44)*	*2.16* *(19)*	2.01 (228)
Column Total	1.52 (84)	2.05 (135)	2.38 (132)	2.55 (104)	2.60 (134)	

With the subjects thus arrayed, a two-way analysis of variance can be computed to answer each of the following questions:

1. Are the average credibility scores for the five publication categories significantly different?

2. Are the average credibility scores for the "Familiar" and "Not familiar" groups significantly different?

3. Is the effect of familiarity or non-familiarity with a publication on credibility significantly different from one publication type to the next, and vice versa?

Briefly, two-way analysis of variance is a statistical procedure that answers these three questions by comparing the variability within each column or row of the table with the variability among all of the columns or rows of the table. Significant differences between the two types of variability indicate similar differences in the population from which the subjects were drawn. Hinkle et al. provide a more in-depth description of the technique.[28] An analysis of variance proceeds through three distinct phases: investigation of assumptions, computation of the analysis of variance, and, if necessary, calculation of a post-hoc multiple comparison procedure.

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[27] The differences in column totals for group size reflect differences in interviewer productivity. The procedure used to determine the publication example about which each subject was asked remained random at the individual interviewer level, and statistical procedures discussed later were used to account for the differences in cell sizes.

Investigation of Assumptions

In theory, two-way analysis of variance produces reliable results only if the data to which it is applied meet three primary assumptions. Hinkle et al. summarize them as follows:[29]

1. All observations are random and independent samples from the population.
2. The distributions of the populations from which the samples are selected are normally distributed.
3. The variances of the distributions in the populations are equal.

In practice, the technique produces reliable results even if assumption two is not met. Furthermore, assumption three can be relaxed as long as the numbers of observations within each cell of the table are equal.[30]

The data in this study meet the first assumption by virtue of the random selection process by which members of the North Carolina population were chosen to participate and the random process that decided which subjects would be asked about which publication example. Assumption two generally is considered met if the scores within each cell of the table are normally distributed.[31] Such is the case in all cells of the table in this study except for the "Familiar with publication/Supermarket tabloids" cell. As noted earlier, however, analysis of variance produces reliable results even when this assumption is violated.

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[28] HINKLE ET AL., *supra* note 26, 383-422.

[29] *Id.* at 336.

[30] G.V. Glass et al., *Consequences of Failure to Meet the Assumptions Underlying the Use of Analysis of Variance and Covariance*, 42 REV. OF EDUC. RES. 3,237-288 (1972).

To test assumption three, a Levene's statistic was computed for the table. The result indicated that the data met the assumption.[32]

Computation of ANOVA

Table 4 summarizes the results of the analysis of variance computed for the data in Table 3.[33]

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[31] "Normally distributed" is defined in this study as distributions displaying skewness and kurtosis figures within three standard errors of zero. Skewness measures how far off center the "peak" of the distribution leans, and kurtosis measures the height of the "peak" relative to the rest of the distribution. In a perfectly normal distribution, both skewness and kurtosis equal zero.

[32] The Levene's Test computation yielded a value of 1.6685, which was non-significant at the .05 probability level.

[33] The regression approach to analysis of variance was used because it carries no requirement that cell sizes be equal or proportional. In the SPSS/PC+ Statistical Package, the approach is chosen by specifying the "Option 9" subcommand.

Table 4
ANOVA results summary

	Sum of squares	Degrees of freedom	Mean Square	F	Sig. of F
Publication type	62.60	4	15.65	30.24	.00
Familiarity with publication	17.00	1	17.00	32.84	.00
Interaction	3.75	4	.94	1.81	.13
Explained	97.85	9	10.87	21.01	.00
Residual	299.28	578	.52		

The key pieces of information in Table 4 can be found in the "Significance of F" column. The values there indicate the following answers to the three questions mentioned earlier:

1. Question: Are the average credibility scores for the five publication categories significantly different?
   Answer: Yes, at the .05 level of probability. (Significance of F for "Publication type" equals .00, which is less than .05).

2. Question: Are the average credibility scores for the "Familiar" and "Not familiar" groups significantly different?
   Answer: Yes, at the .05 level of probability. (Significance of F for "Familiarity with publication" equals .00, which is less than .05.)

3. Question: Is the effect of familiarity or non-familiarity with a publication on credibility significantly different from one publication type to the next, and vice versa?
   Answer: No, at the .05 level of probability. (Significance of F for "Interaction" equals .13, which is greater than .05).

A closer look at the answer to question No. 1 reveals that a key piece of information is missing. The analysis of variance indicated that the average credibility scores for the five publication categories differed significantly, but it did not indicate -- mainly because it could not indicate -- which publication categories differed significantly from which other categories with respect to credibility. Two could differ from each other, all five could differ from one another, or some scenario somewhere between the two extremes could exist. Notice that the issue posed no problem in question No. 2 because there are only categories of publication familiarity -- those familiar with the publication and those not familiar with the publication. The difference that the analysis of variance detected for question No. 2 must lie between these two categories because it can lie nowhere else. When analysis of variance detects significant differences between three or more categories, a post-hoc multiple comparison procedure must be performed if one wants to know which categories differ significantly from which other categories.

Post-hoc Multiple Comparison Procedure

Application of the Tukey/Kramer Method is the appropriate post-hoc multiple comparison procedure for a two-way factorial analysis of variance with unequal cell sizes. Hinkle et al. fully explain the computations involved in calculating the required "Q" statistic.[34] The procedure determined that group pairs with a Q value exceeding 3.858 were significantly different at the .05 level of probability. Table 5 summarizes the results. A "*" indicates pairs that were significantly different with respect to credibility.

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[34] HINKLE ET AL., *supra* note 26, at 363-364.

Table 5
"Q" Values for Credibility Scores
of Pairs of Publication Types

	Supermarket Tabloids	National Newspapers	National News Magazines	National Gen. Interest Magazines	Adult Magazines
Supermarket Tabloids	----------	13.80*	15.25*	12.11*	7.49*
National Newspapers	13.80*	----------	.75	2.55	7.53*
National News Magazines	15.25*	.75	----------	3.53	8.86*
Gen. Interest Magazines	12.11*	2.55	3.53	----------	5.30*
Adult Magazines	7.49*	7.53*	8.86*	5.30*	----------

Pairing the data in Table 5 with the data in Table 3 indicates that supermarket tabloids received a significantly lower credibility rating than each of the remaining publication categories. Adult magazines received a significantly lower credibility rating than national newspapers, news magazines or general-interest magazines but a significantly higher credibility rating than supermarket tabloids. National newspapers, news magazines, and general-interest magazines did not differ significantly from one another with respect to credibility.

To summarize, T-tests indicated that the study's measurement scheme was generally reliable. Furthermore, the data met the assumptions necessary for application of the analysis of variance technique. The analysis of variance detected significant differences among the average credibility scores of the five publication categories. It also detected significant differences between the average credibility score given by those who were familiar with the publication about which they were asked and the average credibility score given by those who were not familiar with the publication about which they were asked. The effect of publication type on credibility was essentially the same regardless of how familiar subjects were with the publication, and vice versa. A post-hoc multiple comparison procedure determined which publication categories differed significantly from which others in terms of credibility.

Experiment

Results of the experiment were analyzed using a statistical technique called repeated-measures analysis of variance. Similar to the two-way analysis of variance technique mentioned earlier, repeated-measures analysis of variance detects differences in the effects of three or more conditions or treatments on each of the experiment's subjects. Again, Hinkle et al. provide a more in-depth description of the technique.[35] Like two-way analysis of variance, a typical repeated-measures analysis of variance proceeds through three distinct phases: investigation of assumptions, computation of the analysis of variance, and, if necessary, a post-hoc multiple comparison procedure.

Investigation of assumptions

Hinkle et al.[36] summarize the assumptions necessary for repeated-measures analysis of variance as follows:

1. The sample was randomly selected from the population.
2. The dependent variable is normally distributed in the population.
3. The population variances for the test occasions are equal.

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[35] *Id.* at 316-347.

[36] *Id.* at 347.

4. The population correlation coefficients between pairs of test occasion scores are equal.

Like most other controlled experiments in the social sciences, the data for the present experiment do not meet the first assumption. The subjects were college students who took part in the experiment in exchange for a reward of extra credit. They were not chosen at random from the general population. The data also fail to meet the second assumption; the dependent variable, believability, yields a distribution skewed decidedly in favor of high believability.[37] Failure to meet this assumption, however, has been shown to have little significant impact on the validity of the results.[38] Failure to meet assumptions three and four can have severely adverse effects on the analysis' validity. Fortunately, however, the current data fulfill both requirements.[39]

Computation of ANOVA

Table 6 indicates the average of the believability measure across all 48 subjects for each of the four publications. The standard deviation, a measure of dispersion, is also shown.

[37] Negative skewness is defined in this study as a skewness farther than three standard errors from zero. The distribution for the data at hand yielded a skewness of -.88 and a standard error of .175. Thus the skewness is approximately five standard errors below zero.

[38] Glass et al., *supra* note 30.

[39] Mauchley's test of spherecity is one appropriate statistic for testing these two assumptions. When applied to the current data, the test yielded a value of .955. The value's corresponding significance level of .836 indicated that the data met the assumptions.

Table 6:
Believability measure descriptive statistics

Publication	Mean	Standard Deviation
National Enquirer	5.187	1.539
Playboy	5.688	1.188
New York Times	5.792	1.202
New Yorker Magazine	5.813	1.197

As the table shows, the *National Enquirer* scored lowest on the believability measure, and the *New Yorker Magazine* scored highest. Table 7 shows the results of applying repeated-measures analysis of variance to the data:

Table 7:
ANOVA summary table

	Sum of Squares	Degrees of Freedom	Mean Squares	F	Significance of F
Differences among individuals	142.49	47	3.03	---	---
Differences among publications	12.39	3	4.13	3.42	.019
Residual	170.36	141	1.21	---	---
Total	325.24	191	---	---	---

As the table shows, two or more of the publications were found to be significantly different on the believability measure at the .05 level of probability. As before, however, the analysis cannot indicate precisely which publications were found to be significantly different from which others. To answer that question, a post-hoc multiple comparison procedure must be employed.

Post-hoc procedure: Tukey's HSD

Tukey's HSD (honestly significant difference) test is the appropriate post-hoc procedure for a repeated-measures analysis of variance. Hinkle et al. describe the computations involved.[40] Table 8 summarizes the results. An asterisk marks pairs of publications found to be significantly different from each other on the believability measure at the .05 level of probability.

Table 8:
Tukey's HSD Analysis

	New Yorker	N.Y. Times	Playboy	National Enquirer
New Yorker	---	.021	.125	.625*
N.Y. Times	.021	---	.104	.604*
Playboy	.125	.104	---	.500
Nat. Enquirer	.625*	.604*	.500	---

HSD Critical value = .5825

As the table shows, *The National Enquirer* was found to be significantly different from both *The New Yorker Magazine* and *The New York Times* on the believability measure. It should be noted that *Playboy*, in this experiment, apparently represents some kind of middle ground on the believability measure, being different neither from *The National Enquirer* on one hand nor from *The New Yorker* or *The New York Times* on the other hand.

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[40] HINKLE ET AL., *Supra* note 26, at 359.

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Discussion

Hypotheses

Both the field study and the experiment indicated support for the first hypothesis, which postulated that potentially defamatory statements appearing in some types of publications are perceived as significantly more truthful than such statements appearing in other types of publications. The results of the two research designs varied slightly with respect to adult magazines. In the field study, adult magazines formed a distinct category -- higher on the believability measure than supermarket tabloids but lower on the believability measure than national newspapers, news magazines and general-interest magazines. In the experiment, however, the adult magazine *Playboy* showed no significant difference from a national newspaper, *The New York Times,* or a national, general interest magazine, *The New Yorker.* The inconsistency may simply indicate that *Penthouse* enjoys substantially less credibility than *Playboy*. Recall that *Penthouse* was paired with *Playboy* in the field experiment to represent the adult magazines category. *Playboy* fared better on the believability measure when it was allowed to stand alone in the experiment.

The field study also found support for the second hypothesis, which stated that people familiar with a publication consider potentially defamatory statements appearing in the publication significantly more truthful than do people who are not familiar with the publication. Table 3 shows that people familiar with the publication about which they were asked gave an average credibility rating of 2.42, compared to the average credibility rating of 2.01 given by those not familiar with the publication about which they were asked. The analysis of variance found the difference between the two average ratings to be significant.

Furthermore, the effect of publication familiarity on credibility was essentially the same regardless of the type of publication. Likewise, the effect of the type of publication on credibility was essentially the same regardless of subjects' familiarity with the publications about which they were asked.

Limitations

The present study has three chief limitations. First, the experiment's methodology did not allow a test of the second hypothesis. Also, the category of "national news magazines" was not represented in the experiment. The size of the experiment had to be limited for practical reasons, and the "national news magazine" category was chosen as the least important. Finally, this study looks only at initial judgments about potentially defamatory statements. As Hovland and Weiss' "sleeper effect" suggests, the passage of time may significantly affect the degree of belief such a statement engenders. Perhaps future research on the topic can fill these gaps. The present study draws strength, however, from its blending of the indirect yet generalizable measures employed in the field study and the direct but less generalizable measures used in the experiment.

Conclusion

Conclusions must be made with caution given the paucity of research thus far on the link between source credibility and reputational harm. The results of this study, however, indicate that courts are justified in edging toward factoring source credibility into decisions about reputational harm. Precisely where such a course leads is difficult to say. One possibility is that considering source credibility as a factor in libel cases could result in limited liability for defendants with little or no significant credibility. Another possibility is that a desire to punish such defendants could prompt an increase in damage awards like the one granted in *Burnett v. National Enquirer, Inc.*[41] The jury initially awarded comedienne Carol Burnett $300,000 in compensatory damages and $1.3 million -- more than four times as much -- in punitive damages. The appeals court slashed the size of both awards, giving Burnett $50,000 in compensatory damages and $150,000 in punitive damages. But the ratio of the two amounts was still three-to-one in favor of punitive damages. Although neither the trial court nor the appellate court explicitly linked the *Enquirer's* credibility or lack thereof with the amount of harm done to Burnett's reputation, the disparity between the compensatory and punitive damages awarded may indicate that such a link was considered.

Both options carry troublesome implications. Few First Amendment scholars would argue that there is justice in "rewarding" sloppy journalism with limited liability for reputational harm. On the other hand, "punishing" sloppy journalism by awarding inflated punitive damages broaches the difficult question of who defines sloppy journalism, and how. Part of the solution may lie in recognizing that suits like *Burnett* perhaps can be thought of more accurately as suits for infliction of emotional distress rather than for reputational harm. Regardless of whether readers believed the *Enquirer's* false implication that Burnett had gotten drunk and rowdy in a Washington, D.C., restaurant, Burnett feared that they had, and that fear, according to her testimony, caused her a great deal of anxiety.

But such is a topic for another study. In the meantime, evidence so far suggests that publications which repeatedly cry wolf when the sheep in truth are safe and sound soon find their ability to rouse the townsfolk severely impaired.

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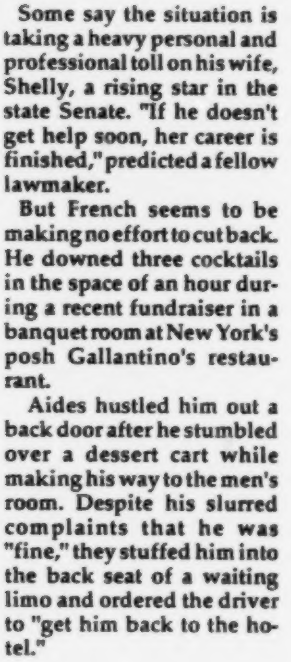
[41] Burnett v. National Enquirer, Inc. 144 Cal. App 3d 991 (1983).

Appendix A

Source: *Playboy*, August 1985



Some say the situation is taking a heavy personal and professional toll on his wife, Shelly, a rising star in the state Senate. "If he doesn't get help soon, her career is finished," predicted a fellow lawmaker.

But French seems to be making no effort to cut back. He downed three cocktails in the space of an hour during a recent fundraiser in a banquet room at New York's posh Gallantino's restaurant.

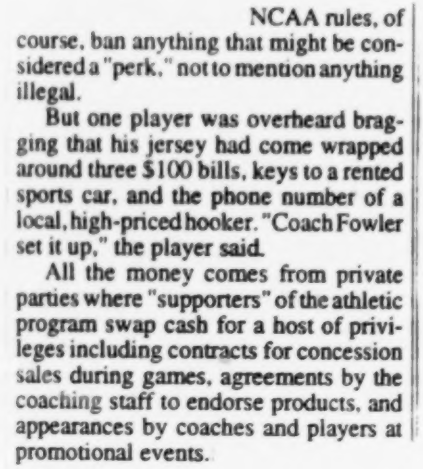
Aides hustled him out a back door after he stumbled over a dessert cart while making his way to the men's room. Despite his slurred complaints that he was "fine," they stuffed him into the back seat of a waiting limo and ordered the driver to "get him back to the hotel."

Source: *The New York Times*, June 12, 1983

Any time a woman was booked into the jail, Sheriff Carrington would have a deputy frisk her and give her a canvas sack and an orange jumpsuit. The woman then would be told to step into a small room next to the sheriff's office, strip naked, put her clothes in the sack and put on the jumpsuit. "If he liked the way the woman looked, he'd go into his office and watch her on the security camera," confided one deputy. "Guys the sheriff thought he could trust got an invite to go in with him."

Sometimes, a woman would see the camera and keep her back to it. But most never noticed it, according to the deputy.

Source: *The National Enquirer*, Dec. 21, 1991

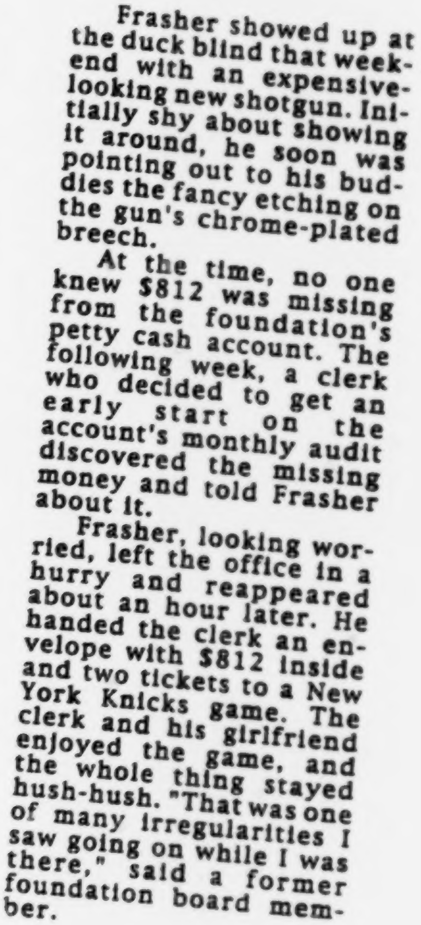


NCAA rules, of course, ban anything that might be considered a "perk," not to mention anything illegal.

But one player was overheard bragging that his jersey had come wrapped around three $100 bills, keys to a rented sports car, and the phone number of a local, high-priced hooker. "Coach Fowler set it up," the player said.

All the money comes from private parties where "supporters" of the athletic program swap cash for a host of privileges including contracts for concession sales during games, agreements by the coaching staff to endorse products, and appearances by coaches and players at promotional events.

Source: *The New Yorker Magazine*, Sept. 15, 1990



Frasher showed up at the duck blind that weekend with an expensive-looking new shotgun. Initially shy about showing it around, he soon was pointing out to his buddies the fancy etching on the gun's chrome-plated breech.

At the time, no one knew $812 was missing from the foundation's petty cash account. The following week, a clerk who decided to get an early start on the account's monthly audit discovered the missing money and told Frasher about it.

Frasher, looking worried, left the office in a hurry and reappeared about an hour later. He handed the clerk an envelope with $812 inside and two tickets to a New York Knicks game. The clerk and his girlfriend enjoyed the game, and the whole thing stayed hush-hush. "That was one of many irregularities I saw going on while I was there," said a former foundation board member.

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LEGISLATIVE MAGIC AND THE LEONARD LAW:

TURNING PRIVATE UNIVERSITIES INTO PUBLIC ENTITIES

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Paper Presented to Law Division
1995 AEJMC Annual Convention
Washington, D.C.
August 12, 1995

Running Head: CORRY

LEGISLATIVE MAGIC AND THE LEONARD LAW:
TURNING PRIVATE UNIVERSITIES INTO PUBLIC ENTITIES

Introduction

Speech codes continue to capture the attention of legal scholars (e.g., Brownstein, 1994; Fleisher, 1994; Gill, 1993) and the judicial system (e.g., Dambrot v. Central Michigan University, 1993; UWM Post, Inc. v. Board of Regents of University of Wisconsin, 1991; Doe v. University of Michigan, 1989). Debate frequently focuses on the ability of public universities to enact and enforce restrictions on racist speech that don't infringe on students' rights of free expression protected by the First Amendment. The issue is well exposed – arguably, *overexposed,* given the plethora of articles[1] – in the pages of law journals and other scholarly publications across the country.

Until recently, however, little if any attention was paid to the ability of *private* universities to enforce speech codes. Traditionally, the First Amendment's Free Speech and Free Press Clauses, incorporated to apply to the states through the Fourteenth Amendment Due Process Clause (Gitlow v. New York, 1925, p. 666), protect private individuals from the actions of government officials and government entities (Nadel v. University of California, 1994, p. 2487). The First Amendment typically has *not* limited the ability of private actors and entities to restrict the speech of others. It was, then, perhaps assumed by legal scholars that private universities could enact restrictions on student speech without triggering constitutional challenges.

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[1] For examples of recent scholarly articles addressing the topic of speech codes, in addition to those identified by author in the first sentence of this paper, please see Delgado and Stefanic (1994), Ebel (1993), Friedman (1993), and Leonard (1993).

So when a state court in California recently was asked to address the validity of the speech code at Stanford University – a *private* university – against the charge that it violated students' rights to free expression under the First Amendment and the California Constitution,[2] there had to be a twist.[3]

That twist came in the form of a 1992 California statute that bootstraps the status of state-controlled public universities onto private, postsecondary educational institutions in California, such as Stanford and the University of Southern California. The California statute in question – the so-called Leonard Law (codified as California Education Code § 94367 (West Supp., 1995)) – turns, via simple wave of the legislative wand, private universities into public universities (in the realm of speech rights), elevates the speech rights of one group of private actors (students at private universities) over another (private universities and their administrators), and threatens to bring an end to the relatively greater academic freedom enjoyed by private universities.

Laying bare the fault line that separates the free speech rights and academic freedom of private universities from government regulation, the Leonard Law's enactment in 1992 threatened to do much more than simply pit private university students against their own schools on the subject of speech codes. By giving these students standing to challenge speech codes on First Amendment grounds, the Leonard Law also set up a potential legal battle pitting the interest of private university academic freedom against the power of state legislative bodies to regulate speech – and speech codes – at private universities. The first skirmish in that battle concluded in February, 1995, in Corry et al. v. The Leland Stanford Junior University et al. (1995).

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[2] Article I, Section 2 of the California Constitution, the state's free speech constitutional provision, provides in relevant part that "every person may freely speak, write, or publish his or her sentiments on all subjects, being responsible for the abuse of this right" (West Publishing, 1994).

[3] Corry et al. v. The Leland Stanford Junior University, No. CV740309 (Superior Court of California, Santa Clara County (Feb. 27, 1995)).

The Leonard Law – the only law of its kind in the country[4] – raised an issue of first impression in Corry, a new issue not previously addressed by other courts or explored in the numerous academic articles on speech codes. That issue, from the perspective of private universities, pivots on academic freedom and the ability to develop and foster an educational environment without undue governmental intrusion. From a legal standpoint, the issue may be framed more simply: May a state legislature foist upon a *private* university the trappings of a *public* university without violating the private university's *own* rights of free speech and freedom of association?

Addressing that issue head on in Corry, Santa Clara County (California) Superior Court Judge Peter G. Stone upheld the Leonard Law as a constitutional exercise of legislative power. In a detailed, 43-page order granting the student-plaintiffs' motion for a preliminary injunction enjoining enforcement by Stanford of its policy against harassive speech, Judge Stone also struck down Stanford's Speech Code for violating students' First Amendment speech rights that are made applicable to them under the terms of the Leonard Law. Judge Stone thus dealt a double blow to Stanford, initially upholding the Leonard Law and then striking down the Stanford Speech Code.

There is nothing remarkable about the latter part of Judge Stone's decision; courts have consistently struck down university speech codes for failing to pass constitutional muster (see, e.g., Dambrot v. Central Michigan University, 1993; UWM Post v. Board of Regents of University of Wisconsin, 1991). Indeed, that portion of Judge Stone's Order addressing whether Stanford's Speech Code violates the First Amendment rights of students reads like a chronological, hornbook summary of the relevant cases in the area: Chaplinsky v. New

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[4] In his Order on Preliminary Injunction (Corry, 1995), Judge Peter G. Stone emphasized that "it does not appear that any other state has enacted a statute similar to Eductation Code § 94367, ie., the Leonard Law, and, neither before the Leonard Law, had California" (p. 22).

Hampshire (1942), Gooding v. Wilson (1972), Lewis v. City of New Orleans (1974), UWM Post v. Board of Regents of University of Wisconsin (E.D. Wis. 1991), R.A.V. v. City of St. Paul (1992), and Wisconsin v. Mitchell (1993) (see Order on Preliminary Injunction, pp. 5-20). Furthermore, in concluding that Stanford's Speech Code was overbroad because it proscribed more than just fighting words defined by Chaplinsky and its progeny, and in holding that the Speech Code was an impermissible content-based regulation similar to that in R.A.V., Judge Stone's reasoning strays little – if at all – from accepted judicial analysis of such issues. To this extent, then, Corry contributes little to judicial precedent on speech codes.

What is remarkable and unique, however, about Judge Stone's decision is that it upholds a state law – the Leonard Law – that extends First Amendment speech rights to students at private universities and that, in doing so, it upholds the power of a state legislative body to intrude, in the realm of student speech, on the academic freedom and speech rights of private universities. This precedent-setting decision – Stanford decided not to appeal Judge Stone's decision (Walsh, 1995) – may spur legislative bodies in other states to enact similar statutes targeting speech codes at private universities. The Leonard Law, then, is what makes Corry unique. That law and Stanford's challenge to it in the case is the focus of this paper.

This paper initially presents an overview of the Leonard Law, exploring its terms and then analyzing and critiquing its legislative history. This is followed by a review of the Stanford University Speech Code, including both the terms of the Speech Code and a look at some of the events at Stanford in the late 1980s that gave rise to its creation. Drawing on the actual pleadings and points and authorities filed by the parties in the case, as well as declarations filed by the plaintiffs, this paper then presents an overview of the Corry case. The case analysis section initially explores the relevant facts of Corry, and then focuses on the issues and arguments presented by the parties regarding the validity of the Leonard Law. That portion of Superior Court Judge Stone's February 27, 1995, Order analyzing the Leonard Law's constitutional validity is then presented. Finally, this paper explores potential ramifications of the court's decision in Corry, including the possibility that states other than California may enact statutes similar to the Leonard Law to attack speech codes at private universities.

The paper also includes an Appendix. Comments about the purpose and scope of the Stanford Speech Code made by its primary author, Stanford Law School Professor Thomas Grey, and published in pamphlet form by Stanford, are set forth in Appendix A.

The Leonard Law

This section initially presents the terms of California Education Code § 94367 and then sets forth a brief review and analysis of its legislative history.

The Terms of the Leonard Law

California Education Code § 94367 (West Supp., 1995), dubbed the Leonard Law after the state senator who authored the legislation, provides at subsection (a) that:

> No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution. (Educ. Code § 94367(a))

Signed into law in 1992 by California Governor Pete Wilson and amended without substantive change in 1993, Education Code § 94367 further provides that a student at a private university has standing to seek injunctive or declaratory relief against his or her school if the institution allegedly makes or enforces a rule violating the provision set forth above. Prevailing plaintiffs also may recover attorney's fees in actions brought under the statute (Educ. Code § 94367(b)).

Private postsecondary institutions controlled by religious organizations, however, are exempt from the law, to the extent that the "application of this section would not be consistent with the religious tenets of the organization" (Educ. Code § 94367(c)). The statute also provides that it does not "authorize any prior restraint of student speech" (Educ. Code § 94367(d)).

The remaining subsections of the statute appear to give the regulated institutions *some* power to control student speech. Specifically, subsection (e) provides that the law does not prohibit "the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected" (Educ. Code § 94367(e)). In addition, the statute allows private universities to adopt rules and regulations designed to prevent so-called "hate violence" that would deny students "their full participation in the educational process," provided those rules do not abridge the freedom of speech protections of the First Amendment and/or the California Constitution (Educ. Code § 94367(f)).

In summary, subsections (a), (b), (c), and (d) of the Leonard Law advance student rights of free speech while, concomitantly, inhibiting the rights of private institutions. This quartet of subsections, in a nutshell: 1) turns private, non-religious postsecondary institutions into governmental entities and public forums for purposes of student speech; 2) provides students with methods for judicially enforcing their newly found free speech rights; and 3) limits the academic freedom of private, secular postsecondary institutions to enforce speech codes that may run afoul of the First Amendment and/or the California Constitution.

While subsections (e) and (f) appear to grant power to private institutions to regulate some student speech, each of these provisions specifically comes with the caveat that such restrictions must not breach either state or federal constitutional free speech rights. That caveat ultimately renders moot, in the realm of free speech, the difference between public universities and private, non-sectarian universities.

The Legislative History of the Leonard Law

Senate Bill 1115 (West Supp., 1995), which spawned the Leonard Law, provides an entree to the legislative history behind Education Code § 94367. The bill provides, in relevant part, that "it is the intent of the Legislature that a student shall have the same right to exercise his or her right to free speech on campus as he or she enjoys when off campus" (Senate Bill 1115, 1992).

The bill cites to Tinker v. Des Moines Independent Community School Dist. (1969), a landmark United States Supreme Court decision involving the speech rights of public high school students, for the proposition that students do not shed their speech rights at the proverbial schoolhouse gate. The bill notes that, under Tinker, public high school students possess free speech rights that may be limited only when there is a material disruption of classwork or when the speech causes substantial disorder. Tinker also allows the imposition of content-neutral time, place, and manner restrictions on student speech.

The citation to Tinker, however, is somewhat odd and disingenuous. The Leonard Law applies *neither* to high schools *nor* to public institutions, but rather to *private postsecondary* institutions. A high school, under the terms of California Education Code § 52 (West Supp., 1995), is a *secondary* school, not a postsecondary institution. In light of these facts, the citation to Tinker appears, at best, irrelevant and misguided, and, at worst, an attempt to obfuscate potential constitutional defect that may plague the law: the unilateral ability of a state to elevate the rights of one private actor above another private actor.

The bill also provides that so-called fighting words[5] are not protected under the First Amendment. Specifically, Senate Bill 1115 states:

> The use of "fighting words" or epithets is not protected by the Constitution where (A) the speech, considered objectively, is abusive and insulting rather than a communication of ideas and (B) it is actually used in an abusive manner in a situation that presents an actual danger that it will cause a breach of the peace (Collin v. Smith, 447 F.Supp. 676, 690 (1978), affd. 578 F.2d 1197 (1978), cert. den. 439 U.S. 916 (1978)). (Senate Bill 1115, 1992)

This citation to the fighting words doctrine apparently is intended to give notice to the institutions regulated by the Leonard Law of the type of speech that they may permissibly restrict, perhaps representing an effort by the legislature to avert a vagueness challenge to the statute (e.g., Smith v. Goguen, 1974).

Senate Bill 1115 also appears designed to give private universities the space needed to restrict so-called hate speech.[6] Specifically, the bill provides:

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[5] In Chaplinsky v. New Hampshire (1942), the United States Supreme Court held that fighting words – words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (Chaplinsky, 1942, p. 571) – fall outside the ambit of First Amendment protection.

[6] While the concept of hate speech lacks a precise, agreed-upon definition, several First Amendment scholars have proposed their own definitions. For instance, Smolla (1992) provides that hate speech is "the generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion, and sexual orientation or preference" (Smolla, 1992, p. 152). Critical race theorists Matsuda, Lawrence, Delgado, and Crenshaw (1993) use the term "assaultive speech" interchangeably with hate speech. They define hate speech as "words that are used as weapons to ambush terrorize, wound, humiliate, and degrade" (Matsuda et al., 1993, 1). Haiman (1993) defines hate speech as "the expression of group hatred solely through words and symbols" and "the hurling of racial epithets, the display of symbols of group hatred, and the propagation of maliciously false ideas about groups of people (Haiman, 1993, pp. 26-27).

> Institutions of higher education have an obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity as guaranteed by the state and federal constitutions. (Senate Bill 1115, 1992)

A probe into the legislative history beyond Senate Bill 1115, however, is perhaps more revealing, and makes the language cited to immediately above appear to be only so much window dressing in terms of the power actually retained by private institutions to regulate student speech. According to the Comments of the Assembly Subcommittee on the Administration of Justice (July 10, 1991):

> Apparently, [this bill] has been introduced in response to the proliferation of "speech codes" on various campuses. These codes subject students to discipline if they engage in certain kinds of "hate speech," "racist speech," or other speech designed to intimidate and degrade members [of] perceived to be minority groups. ¶ The author is concerned that these codes add to an atmosphere of intolerance on campus and unfairly punish those students who may sincerely hold beliefs that are contrary to the prevailing political orthodoxy. Students who hold 'minority' views may be intimidated from freely expressing themselves.

In addition, the Republican Analysis of the California Assembly Ways and Means Committee provides that the legislation was designed to invalidate speech codes whose content "derives from former campus liberals who have since moved into the current academic bureaucracy" and who "attempt to indoctrinate college students with one viewpoint" (Republican Analysis, 1991).

A review of these comments presents a more complete picture of the intent behind the Leonard Law – to strike down speech codes at private universities and to provide the mechanism for a legal counter-offensive to a perceived surge of political correctness at such institutions.[7] The bottom line is that, regardless of legislative intent, the actual impact in practice of the Leonard Law is to foist upon secular, private universities in California, the trappings of a public university for purposes of student speech rights. Under the Leonard Law, Stanford is treated like a state actor and its students are treated like public university students.

The Stanford University Speech Code

This section presents the terms of the Stanford Speech Code, as well as a brief background on the development of the Speech Code.

The Terms of the Stanford University Speech Code

In June, 1990, after 18 months of discussion and debate, Stanford University adopted what it officially calls the "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment" (hereinafter referred to interchangeably as the "Interpretation" and the "Speech Code"). The Interpretation,[8] referred to by the plaintiffs in Corry as the Stanford Speech Code (Complaint for Injunctive or Declaratory Relief, 2), was designed to provide students and administrators with guidance on "what the Fundamental Standard means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination" (Student Conduct Policies, 1990, p. 5). As the Interpretation provides at subsection 3, it "is intended

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[7] For further legislative history on the Leonard Law, see Pacific Law Journal (1993, pp. 839-840).

[8] Stanford, in its points and authorities filed in Corry, *never* refers to the Interpretation as a speech code. Instead, Stanford consistently refers to its policy on speech simply as the Interpretation. Like the plaintiffs, however, Judge Stone's Order refers to the Interpretation as the "Speech Code" (Order on Preliminary Injunction, 1995).

"to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins" (Student Conduct Policies, 1990, p. 5). To better understand the Interpretation, however, one must first look to the terms of Stanford's Fundamental Standard, the document whose meaning the Interpretation attempts to clarify.

The Fundamental Standard has governed student conduct at Stanford for nearly a century. Adopted by Stanford in 1896, five years after the University was organized, the Fundamental Standard provides, in its entirety, that:

> Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor, and the rights of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University. (Student Conduct Policies, 1990, p. 4)

The precise meaning of those 44 words, much like the meaning of the 45 words that comprise the single sentence that is the First Amendment, is subject to debate. The dispute about the meaning of the Fundamental Standard in the realm of student speech reached a boiling point in the late 1980s, largely as a result of two allegedly racist incidents on campus described later in this paper.

The Interpretation, adopted more than 90 years *subsequent* to the articulation of the Fundamental Standard, was drafted to dispel ambiguity about the meaning of the Fundamental Standard. The Interpretation provides, in relevant part at subsection 4, that:

> Speech or other expression constitutes harassment by personal vilification if it: a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and b) is addressed directly to the individual or individuals

> whom it insults or stigmatizes; and c) makes use of insulting or "fighting" words or non-verbal symbols. (Student Conduct Policies, 1990, pp. 5-6)

Speech rising to the level of harassment under this definition violates the Fundamental Standard. The Interpretation provides, at subsection 2, that such speech "contributes to a hostile environment that makes access to education for those subjected to it less than equal" (Student Conduct Policies, 1990, p. 5). With this policy in mind, the Stanford Judicial Affairs Office has the power to initiate formal disciplinary proceedings against students alleged to have violated the Interpretation.[9]

Borrowing in part from the United States Supreme Court decision in Chaplinsky v. New Hampshire (1942), the Interpretation also provides at subsection 4 that:

> In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. (Student Conduct Policies, 1990, p. 5)

Despite drafting the Interpretation to restrict only speech that falls within the fighting words category of expression recognized as outside the ambit of constitutional protection (Chaplinsky v. New Hampshire, 1942), Stanford found itself embroiled in a lawsuit in 1994 when the nine student plaintiffs in Corry alleged that the Speech Code restricts constitutionally protected speech. Before discussing Corry, however, a review of the events and incidents that lead to the creation of the Speech Code is set forth to provide context for understanding the purpose and intent behind the Speech Code.

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[9] Between the time of the enactment of the Interpretation and Judge Stone's Order enjoining its enforcement, *no students* were ever prosecuted by the Stanford Judicial Affairs Office for allegedly violating the Interpretation (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 7).

The History of the Stanford University Speech Code

The development of the Interpretation (or Speech Code) at Stanford University was sparked by several incidents of perceived racial hostility in the late 1980s, two of which captured extensive attention on the Stanford campus.

One occurrence, known at Stanford as the "Ujamaa Incident," involved the defacement, in September, 1988, of a Stanford Symphony recruiting poster featuring a picture of Beethoven (Cole, 1990). The incident occurred in the Ujamaa dormitory, an African-American ethnic theme house. Two white students allegedly took a Beethoven poster and defaced it, coloring the face brown, giving it thick, exaggerated lips stereotypical of African-Americans, and adding an afro hairstyle. In addition, the eyes were colored red by the students, to give the poster a more demonic look (Cole, 1990).

The two white students, late at night, then placed the defaced poster next to a chalkboard in Ujamaa near the room of an African-American student with whom they had been in a dispute over whether Beethoven was of black ancestry (Cole, 1990). The next morning, the African-American student saw the defaced poster and linked it to the Beethoven conversation with the two white students (Cole, 1990). Word of the incident quickly spread through Ujamaa before reaching the attention of Stanford officials and the rest of the Stanford community (Cole, 1990).

The event triggered an outcry by the African-American community at Stanford, and then-University President Donald Kennedy appointed two attorneys to conduct a fact-finding investigation of the incident. In addition, Kennedy released an essay entitled "Reflections on Racial Understanding" shortly after the Ujamma Incident (Cole, 1990). Ultimately, however, the two white students involved in the incident were not prosecuted by the Stanford Judicial Affairs Office for a potential violation of the Fundamental Standard, a decision that received robust criticism on the Stanford campus (Cole, 1990).

The other incident, dubbed the "Otero Vigil" after the name of the predominantly white undergraduate dormitory outside of which it took place, occurred shortly after midnight on May 24, 1988 (Cole, 1990). At that time, more than a half-dozen members of a Stanford fraternity donned masks of various kinds, including a hockey mask, goggles, and a motorcycle helmet, carried lighted candles, and gathered on the patio outside of the Otero dormitory. The event was ostensibly intended to protest the eviction of a freshman, who had rushed the fraternity, from the dormitory. However, the image of the Ku Klux Klan was reportedly perceived by most – if not all – of the Otero residents present that night. During the night of the incident, many residents reported feeling fearful for their own safety (Cole, 1990). While the vigil participants and their fraternity ultimately apologized for their actions, the incident triggered an immediate response and protest by the Black Student Union and others in the Stanford community (Cole, 1990).

Shortly after these two incidents, the Student Conduct Legislative Council (SCLC) began drafting the Interpretation of the Fundamental Standard set forth above. The SCLC is comprised of six academic council members appointed by the Senate of the Academic Council, five student members, and the dean of student affairs (or designee thereof). It is charged with promulgating legislation to extend to matters of student conduct involving Stanford's Honor Code and to non-academic matters warranting disciplinary sanctions against students (Student Conduct Policies, 1990, p. 3).

In addition to adopting the Interpretation set forth above, Stanford published a set of official comments by Thomas Grey, a Stanford Law School professor and the principal drafter of the Interpretation, to illustrate the scope and purpose of the Interpretation. A copy of the comments is attached as Appendix A.

Corry et al. v. The Leland Stanford Junior University et al.

This part initially sets forth the facts of Corry. It then explores the arguments set forth by both sides regarding the validity of California Education Code § 94367, also known as the Leonard Law. In addition, it reviews Superior Court Judge Stone's February 27, 1995, Order granting the plaintiffs' motion for a preliminary injunction. Finally, this part explains Stanford University's decision not to appeal Judge Stone's Order.

The Facts

In May, 1994, a group of nine Stanford University students filed a Complaint for Injunctive or Declaratory Relief (hereinafter referred to as the "Complaint") in the Superior Court of California, County of Santa Clara, against Stanford University, Gerhard Casper (Stanford's president), John Freidenrich (chairman of the board of trustees of Stanford), and Sally Cole (Stanford's judicial affairs officer). Seeking to enjoin enforcement of the Interpretation – dubbed by the plaintiffs as the Stanford Speech Code (Complaint for Injunctive or Declaratory Relief, 2) – the plaintiffs asserted that the Interpretation constituted a "content-based, viewpoint discriminatory, prior restraint on speech [that] violates both the United States and California Constitutions and Cal. Educ. Code § 94367"

(Complaint for Injunctive and Declaratory Relief, 2). The plaintiffs also asserted that the Speech Code was substantially overbroad and void for vagueness.[10]

What is critical for purposes of this paper is that each of these free speech arguments was relevant *only* if the Leonard Law was first held to be constitutional by the superior court judge. The Leonard Law laid the foundation on which all of the plaintiffs' First Amendment free speech arguments were grounded, providing the standing necessary to challenge the Speech Code.

The plaintiffs alleged a number of harms caused by enforcement of the Speech Code. In particular, the plaintiffs asserted that:

> The defendants, by maintaining and enforcing Stanford's Speech Code, materially and permanently damage the quality of plaintiffs' education. Defendants hinder the development of a healthy atmosphere of free and open discourse on campus, essential to plaintiffs' education. Defendants' prior restraint harms plaintiffs' ability to effectively engage and refute certain ideas. Through threats, intimidation, and coercion, defendants nurture discriminatory sentiment at Stanford by artificially chilling open discussion of important issues. (Complaint for Injunctive or Declaratory Relief, p. 2)

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[10] This paper focuses on the validity of the Leonard Law. A complete discussion of the plaintiffs' free speech arguments regarding content-based and viewpoint-discriminatory regulations, as well as overbreadth and vagueness challenges, is thus beyond the scope of this paper. It should be noted, however, that the plaintiffs relied heavily upon the United States Supreme Court decision in R.A.V. v. City of St. Paul (1992) (Memorandum of Points and Authorities Supporting Plaintiffs' Motion for Preliminary Injunction, 3-6). In R.A.V., the Supreme Court invalidated a municipal ordinance prohibiting speech "one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." (R.A.V., 1992, p. 2541). The plaintiffs also argued that the Stanford Speech Code restricted more speech than may be proscribed under the fighting words doctrine articulated in Chaplinsky v. New Hampshire (1942) (Memorandum of Points and Authorities Supporting Plaintiffs' Motion for Preliminary Injunction, 5).

The declaration of lead plaintiff Robert J. Corry, then a columnist for the conservative campus newspaper, The Stanford Review, asserted that "the Speech Code has created an atmosphere of 'politically correct' administrative censorship of any speech it deems unacceptable" (Declaration of Plaintiff Robert J. Corry, p. 2). Corry alleged that the Speech Code created a chilling effect on his speech, stating that "I am reluctant to discuss any issues of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin, as proscribed specifically by the Speech Code, for fear of punishment" (Declaration of Plaintiff Robert J. Corry, p. 2).

The declarations of other plaintiffs echoed Corry's sentiment about a chilling effect on student speech. For instance, the declaration of Cyrus F. Rea, III, a law student, provided that:

> This enforced Code of speech and conduct, written by the very professors who have taught me the importance of Constitutional Law, creates a dilemma that I, as a law student, am finding impossible to reconcile. During the nights I study the Constitution, while during the day I fear, lest a forbidden word cross my lips, invoking the wrath of the very people professing the virtues of freedom. (Declaration of Plaintiff Cyrus F. Rea, III, p. 2)

Rather than answering the Complaint, the defendants (hereinafter collectively referred to as "Stanford") filed a demurrer on the grounds that the Complaint failed to state facts sufficient to support a cause of action (Defendants' Demurrer to Complaint for Injunctive or Declaratory Relief, p. 2). Stanford quickly attempted to shift the terms of the debate *away* from its Speech Code[11]

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[11] Stanford maintained, however, that the Speech Code restricted no more speech than may be prohibited under the First Amendment and California Constitution. Assuming for the sake of argument that the court would uphold the Leonard Law, Stanford maintained that its speech policy would survive constitutional scrutiny under Chaplinsky and R.A.V.

to the constitutional validity of the Leonard Law. Stanford thus assumed an attacking role.

As Stanford asserted in its Memorandum of Points and Authorities in Opposition to [the Plaintiffs'] Motion for Preliminary Injunction:

> Plaintiffs complain that Stanford has violated their First Amendment rights by prohibiting them from using fighting words/gutter epithets on its campus (Comp.,¶ 3). Plaintiffs have it exactly backwards: Stanford is a private party. As such, the First Amendment protects its speech rights, and does not prohibit it from doing anything at all. The "First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property . . . ," Lloyd v. Tanner Corp., 407 U.S. 551, 567 (1972) (emphasis in original). (Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 4)

While maintaining that its Speech Code proscribed no more speech than may be prohibited under the First Amendment and the California Constitution, Stanford thus forced the court to confront the validity of the Leonard Law in addition to the terms of the Speech Code itself. After hearing oral argument and reviewing the parties' initial pleadings and briefs, Santa Clara County Superior Court Judge Peter G. Stone ordered the parties to file supplemental memoranda of points and authorities addressing the constitutionality of the Leonard Law. A summary of the parties' arguments regarding the validity of the Leonard Law is set forth below.

Stanford's Attack on the Leonard Law

"The only First Amendment rights at issue here are Stanford's."[12]

Stanford mounted a four-pronged challenge to the Leonard Law. Each part of the attack was rooted in First Amendment jurisprudence, yet each prong represented a distinct approach to the issue. These arguments are set forth below in the order presented by Stanford in its briefs.

Compelled Government Access

Stanford's first line of attack asserted that the Leonard Law amounted to a government mandate that compelled Stanford, as a private actor, to give access to the speech of others with which Stanford disagreed and found offensive (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 8). More specifically, Stanford argued that the law compelled it to accept student speech that Stanford deemed restricted by its Speech Code and repugnant to the University's Fundamental Standard governing student conduct (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 8).

Citing to Wooley v. Maynard (1977) (holding that a state cannot require one to display the phrase "Live Free or Die" on a license plate), Miami Herald Publishing Co. v. Tornillo (1974) (striking down a state right-of-reply statute that required newspapers to provide rebuttal space to candidates attacked in editorials), and Pacific Gas & Elec. Co. v. Public Utility Commission (1985) (hereinafter "Pacific Gas" and described below), Stanford argued that "the First Amendment prohibits the state from requiring a private party to provide access for another's speech the party disagrees with" (Memorandum of Points and

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[12] Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 8.

Authorities in Support of Demurrer to Complaint for Injunctive or Declaratory Relief, p. 5). In Pacific Gas, the United States Supreme Court struck down a state law that required the plaintiff to include a consumer group's circulars in envelopes that contained bills sent by the plaintiff utility company. The Supreme Court held that California neither could require the plaintiff to "associate with speech with which . . . [it] may disagree . . .," (Pacific Gas, p. 15) nor could it mandate that the plaintiff advance any speaker's access "by burdening the expression of others" (Pacific Gas, p. 20).

Emphasizing that it was *not* a for-profit corporation, unlike the plaintiff in Pacific Gas, Stanford argued that its speech rights were even *greater* than those of Pacific Gas (Memorandum of Points and Authorities in Support of Demurrer to Complaint for Injunctive or Declaratory Relief, pp. 6-7). In particular, Stanford argued that its status as a university with academic freedom protected under the First Amendment[13] gave it protections beyond the realm of those enjoyed by corporations like Pacific Gas. If the utility company in Pacific Gas could not be compelled to give access to speech with which it disagreed, then, Stanford argued, a private university should not be compelled to give access to speech with which it not only disagreed, but which offended its standard of student speech and conduct.

The Leonard Law Is A Content-Based Regulation That Fails To Survive Strict Scrutiny

In addition to the compelled access argument, Stanford argued that the Leonard Law was a content-based regulation on speech that failed to serve a compelling state interest (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, pp. 12-16). Stanford asserted that the law was content-based because it required the University to permit speech whose content is protected from governmental restriction off-campus, and because it applied only to speech whose specific content Stanford disagreed with. A law is "content-based" unless it "serves purposes unrelated to the content of expression" and "even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys" (Turner Broadcasting Services v. FCC, 1994, pp. 2458-59).

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[13] Stanford cited to a number of cases to support its argument that academic freedom at the university level is protected by the First Amendment, including Piarowski v. Illinois Community College Dist. (7th Cir. 1986), Regents of the University of Michigan v. Ewing (1985), and Redgrave v. Boston Symphony Orchestra (1st Cir. 1988).

Stanford turned, in part, to the legislative history of the Leonard Law to support its argument about the content-based nature of the statute (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, pp 13-14). The University argued that the legislative history revealed that the purpose of the statute was to prohibit private universities from regulating hate speech whose content does not conform to the prevailing ideology and is not politically correct (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 14).

Stanford then alleged that the Leonard Law could not survive the so-called strict scrutiny standard of review to which content-based restrictions on speech are subjected (e.g., Sable Communications of California, Inc. v. FCC, 1989). Under this standard, the government must assert a compelling state interest to justify the restriction, and must show that the means are carefully tailored to serve that interest (Sable Communications of California, Inc. v. FCC, 1989, p. 126). Stanford argued that:

> The government has no legitimate interest, much less a compelling interest, in advancing one private party's speech by forcing another who disagrees with it to give access to it. [citation omitted] To the contrary, the government cannot – in the name of promoting free

> speech or otherwise – burden one party's speech to advance another's [speech]. (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 14)

The speech that Stanford claimed was burdened by the Leonard Law was the University's Speech Code, while the speech advanced or promoted by the statute, Stanford argued, included only gutter epithets of no speech value. As Stanford contended, "no court has ever found a sufficiently compelling interest to justify a content-based regulation prohibiting a private entity from excluding from its premises speech (if gutter epithets are speech) it finds abhorrent. This [court] should not be the first" (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 16). In summary, Stanford argued that the Leonard Law failed to survive the strict scrutiny standard of review under which content-based restrictions are analyzed.

Prohibition of Stanford's Speech

Closely related to the preceding argument, Stanford also asserted that its Speech Code constituted protected expression under the First Amendment (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, pp. 16-18). Asserting that the Speech Code "expresses Stanford's view that fighting words/gutter epithets are literally intolerable to it and have no place on its campus" (Memorandum of Points and Authorities in Support of Demurrer to Complaint for Injunctive or Declaratory Relief, p. 11), Stanford argued that the Speech Code "is protected under the First Amendment both because it is pure speech and because it embodies and effectuates Stanford's right to determine the terms of association within it" (Memorandum of Points and Authorities in Support of Demurrer to Complaint for Injunctive or Declaratory Relief, p. 11). Stanford alleged that California lacked the compelling interest necessary to restrict the University's own expression of speech.

Stanford then added a more creative attack to bolster its argument that its own free speech rights were at issue. The University argued that any discipline imposed by Stanford under its Speech Code would constitute protected *expression* under the symbolic speech doctrine (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 17). In other words, punishment meted out for a violation of the Speech Code would amount to the University expressing its views about particular instances of student speech. As Stanford put it, "discipline, if imposed, would at the least be expressive conduct" (Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 17). Under the symbolic speech doctrine, conduct may constitute speech for purposes of First Amendment protection if the person engaged in the conduct has an intent to convey a particular message and if there is a great likelihood that the message will be understood (Spence v. Washington, 1974, p. 404). Stanford argued that the Leonard Law's purpose was *not* unrelated to the suppression of Stanford's speech, and the legislature could not justify its restriction upon Stanford's expression under the watered-down intermediate scrutiny test applied in United States v. O'Brien (1968). That test requires a state to prove only "an important or substantial government interest" (United States v. O'Brien, 1968, p. 377) to justify its restriction on speech, rather than the compelling interest that must be shown to uphold a content-based regulation.

Interference with Stanford's Right of Association

The fourth prong of Stanford's First Amendment attack on the Leonard Law rested *not* on the Free Speech Clause, but rather on the unenumerated First

Amendment right of association (Roberts v. United States Jaycees, 1984).[14] The University argued that:

> If the [Leonard Law] prohibits Stanford from proscribing . . . fighting words/gutter epithets and disciplining those students who use them, then the [Leonard Law] prohibits Stanford from excluding students who accost fellow students with those epithets; prohibits Stanford from protecting itself and its students from intrusion by students who do that; and makes Stanford abandon its most basic goals and high ethical standards, indeed, the proscriptions of its Fundamental Standard. (Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 15)

In a nutshell, Stanford argued that it should have the right to exclude from its "association" those students who violate its standards of speech and conduct. Stanford bolstered its freedom of association argument by emphasizing that the association in question was a university with academic freedom recognized under the First Amendment (Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 15). Citing to Regents of University of California v. Bakke (1978), Stanford argued that "the freedom of a university to make its own judgments as to education includes the selection of its student body" (Bakke, 1984, p. 312).

In summary, Stanford's attack on the Leonard Law was grounded in the First Amendment. That attack raised a myriad of challenges to the state statute, ranging from arguments against government-compelled access and content-based regulations on free speech to evoking the symbolic speech doctrine and the unenumerated right of association.[15] At the core of all of these arguments, however, lay one central principle on which Stanford hoped to sway the court – the Leonard Law was an unjustified governmental intrusion into the private halls of academia.

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[14] In Griswold v. Connecticut (1965), Supreme Court Justice Douglas stated that the right of association "is not mentioned in the Constitution nor in the Bill of Right" (Griswold, p. 482), but emphasized that "while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful" (Griswold, p. 483).

Plaintiffs' Arguments in Support of the Leonard Law

Starting from the premise that "states routinely regulate the behavior of private actors" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 1), the plaintiffs argued that the Leonard Law was an "example of legitimate and constitutional state lawmaking" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 1). In a nutshell, the plaintiffs asserted that there was nothing unique or special about the Leonard Law; it was simply one of many pieces of legislation churned out annually by the state legislature in Sacramento that impinged on the rights of private individuals and entities. As the plaintiffs stated in their points and authorities, "virtually every law ever enacted by the California State legislature has the intent and effect of impacting private actors and associations in some manner, and the State currently regulates in some way nearly every aspect of Defendants' affairs" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 2). The power to enact such restrictions, the plaintiffs argued, is part of the state police power to regulate on behalf of the public's health, safety, and welfare (Plaintiffs' Reply to Defendants'

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[15] For further analysis by the United States Supreme Court on the right of association, see Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 2).

For instance, the plaintiffs argued that the Leonard Law was no different from the Unruh Civil Rights Act (Cal. Civil Code § 51 et seq.) that guarantees that all citizens of California enjoy the equal protection of the laws, whether within a state forum or within a private business establishment. The plaintiffs argued that the Unruh Act had been upheld by the United States Supreme Court against an attack by a private institution, the Rotary Club, that it violated the Rotary Club's right of expressive association afforded by the First Amendment (Board of Directors of Rotary Int'l v. Rotary Club, 1987).

The plaintiffs also tried to reframe the primary issue, pegging it on whether Stanford's private *property* rights outweighed student's free *speech* rights. Citing to the decision of the United States Supreme Court in Marsh v. Alabama (1946), the plaintiffs argued that the right to freedom of speech occupies "a preferential position" (Marsh v. Alabama, 1946, p. 509) when compared to the constitutional rights of owners of property (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 1). Under the plaintiffs' line of reasoning, student speech rights outweighed Stanford's private property rights.

Responding to Stanford's assertion that the Leonard Law abridged the University's own rights of free expression, the plaintiffs argued that the statute actually "*expands* the realm of speech without favoring one side over the other" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 17, emphasis in original) and that "California's interest in the Leonard Law is unrelated to the suppression of free expression" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary

Injunction, p. 17). To this extent, plaintiffs argued that the Leonard Law "simply does not restrict speech or ideas in any way; Defendants have every opportunity to express freely any views" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 17). In addition, the plaintiffs asserted that the state had a compelling interest "in assuring that students are fully educated" (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, p. 17).[16]

Perhaps the most creative of the plaintiffs' arguments, however, rested on an attempt to characterize Stanford not as a private academic entity, but rather as a public forum under California law. Relying heavily on the United States Supreme Court decision in Pruneyard Shopping Center v. Robbins (1980), the plaintiffs argued that because the Stanford Shopping Center rests on property owned by the university, the university takes on the status of a public forum (Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, pp. 20-22). In Pruneyard, the Supreme Court held that California may permit individuals to exercise free speech rights in private shopping centers, even though the federal constitution provides no such protection (Pruneyard, 1980, p. 84). The California Supreme Court had previously held that, under the California Constitution, the plaintiffs in that action were entitled to set up a booth to solicit signatures for petitions opposing a United Nations resolution despite the fact that the property was privately owned. The Stanford Shopping Center, replete with the obligatory

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[16] The plaintiffs, who filed their supplemental memorandum of points and authorities *after* Stanford, responded to each of Stanford's four arguments against the constitutional validity of the Leonard Law. Judge Stone's Order, described below in detail, ultimately adopted and incorporated many of these arguments. For the sake of avoiding redundancy, the plaintiffs' arguments on these issues that were adopted by Judge Stone are described later in the section presenting Judge Stone's Order.

GAP and Banana Republic mall fare, rests physically on Stanford property but is not, according to the declaration of an attorney in the Stanford Office of General Counsel, "part of the Stanford campus for purposes of student discipline" (Declaration of Jennifer Westerlind in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 2). In a nutshell, the plaintiffs in Corry argued that Stanford was little more than a giant shopping mall.

The Superior Court's Decision

Nearly three months after the parties filed their final supplemental memoranda of points and authorities regarding the validity of the Leonard Law, Judge Stone entered, on February 27, 1995, a 43-page "Order on Preliminary Injunction" upholding the Leonard Law and striking down the Stanford Speech Code. This section summarizes that part of the Order directly relating to the Leonard Law, quoting from the Order when necessary to preserve Judge Stone's reasoning.

Judge Stone initially acknowledged that Stanford was a private party rather than a state actor, noting that the United States Supreme Court has previously declined to characterize private universities as state actors despite public funding and public regulation in many areas outside the realm of speech (Order on Preliminary Injunction, p. 3). He further made it clear that the issue he was addressing was one of first impression, stating that "it does not appear that any other state has enacted a statute similar to Education Code § 94367, ie., the Leonard Law, and, neither before the Leonard Law, had California. Therefore, this [sic] is a paucity of appellate guidance directly on point" (Order on Preliminary Injunction, p. 22). Judge Stone then proceeded to address – and to reject – each of Stanford's arguments that the Leonard Law violated the University's First Amendment rights.

Compelled Government Access

As noted above, Stanford argued that the Leonard Law amounted to a government attempt to compel the University to give access to speech with which it disagreed and found offensive. Judge Stone, however, distinguished the facts in both Miami Herald Publishing Co. v. Tornillo (1974) and Pacific Gas & Elec. Co. v. Public Utility Commission (1985) – the two cases around which Stanford built its compelled access argument – from the facts in Corry.

Judge Stone stated that "it appears that the Court's decision in Tornillo . . . was predicated on prior restraint concerns and editorial control, not on the political content of the speech" (Order on Preliminary Injunction, p. 30). In Tornillo, the United States Supreme Court struck down a Florida right-of-reply statute that required newspapers to provide rebuttal space to candidates attacked in editorials. Citing to the Plaintiffs' Reply to Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction (Corry, 1995, p. 10), Judge Stone accepted the plaintiffs' argument that, in contrast to the right-of-reply statute at issue in Tornillo, the "Leonard Law will not deter Defendants from speaking out (in fact, the Leonard Law expands the realm of speech), and it will not force Defendants to respond where they may prefer to remain silent. These differences render the Tornillo concerns in apposite here" (Order on Preliminary Injunction, p. 30).

The judge also agreed with plaintiffs' argument that Pacific Gas (described above) was readily distinguishable from Corry. As Judge Stone's Order states:

> Plaintiffs correctly argue that the only way that the [Pacific Gas] facts would govern this case would be if the Leonard Law, where a controversy arose, licensed only the speech that Defendants currently restrict and prohibited all other speech. In that case, Defendants might well be forced into remaining silent for fear of

> having to provide equal air time to its opponents. However, plaintiffs correctly state that the [Leonard] Law does no such thing; rather, it expands the realm of protected speech without forcing defendants into silence for fear of reprisal. More speech will be engendered, thus fulfilling the dictates of the First Amendment. (Order on Preliminary Injunction, pp. 30-31)

Judge Stone also rejected Stanford's argument that its status as an academic institution should give it *more* protection than that given to the plaintiff in Pacific Gas. Again accepting the arguments of the plaintiffs, Judge Stone's order provides that:

> Plaintiffs persuasively argue that unconstitutional restrictions on speech, when unrelated to course work, are not saved by the umbrella of academic freedom. In this case, the Leonard Law is not an attempt by the State to force Defendants to permit fighting words on their campus. Rather, it merely ensures that constitutionally protected speech not be restricted on Defendants' campus. (Order on Preliminary Injunction, p. 31)

In a nutshell, Judge Stone narrowly construed the academic freedom enjoyed by private universities, holding that such freedom extends only to the realm of "course work" (Order on Preliminary Injunction, p. 31). Academic freedom does not, according to Judge Stone's order, allow a private university to adopt a speech code to foster its own academic and educational environment if that speech code restricts more speech than may be proscribed under the First Amendment.

Content-Based Speech Regulation

Judge Stone also rejected Stanford's argument that the Leonard Law was a content-based regulation on speech that could not survive the strict scrutiny standard of review. Judge Stone, in fact, adopted the plaintiffs' argument that the Leonard Law was, instead, a content-neutral regulation. As Judge Stone's Order provides:

> The correct inquiry for determining whether a law is content-neutral is to investigate, from the perspective of the party against whom the law is directed, whether the law imposes a restriction, penalty, or burden by reason of the views . . . of that party [citations omitted]. Plaintiffs argue that the Defendants are not penalized under the Leonard Law on the basis of the views they express; rather, students are entitled to engage in speech protected by the First Amendment, independent of the views expressed by Defendants. As such, the law is content-neutral in its application against Defendants. Plaintiffs are correct. (Order on Preliminary Injunction, p. 33)

Judge Stone then went on to add that:

> The only basis that the Defendants have to characterize the Leonard Law as content-based is that they [Stanford] have implemented a content-based Speech Code and because the [Leonard] Law, by disallowing Defendants' content restrictions, necessarily sweeps into its ambit of protecting previously restricted speech. By definition, any law that seeks to restore protections that have been limited by another party necessarily brings the previously prohibited conduct under its protection; this does not, however, make the law content-based. (Order on Preliminary Injunction, p. 34)

In summary, Judge Stone found unpersuasive Stanford's argument that the Leonard Law was a content-based restriction on Stanford's own speech, and he concluded that the Leonard Law was, in fact, a content-neutral statute. Further, he held that the Leonard Law served an important state interest in enhancing student speech.

Prohibition of Stanford's Speech

Judge Stone also rejected Stanford's argument that its Speech Code constituted expression that the Leonard Law unconstitutionally infringed upon. Once again, Judge Stone's Order adopted the reasoning of the plaintiffs. In particular, Judge Stone ruled that the Leonard Law does not restrict Stanford's speech in any manner because Stanford has alternative avenues – alternatives to its Speech Code – for expressing its disgust with student behavior that violates its Fundamental Standard. As Judge Stone put it:

> The Leonard Law does not chill the speech and expression of Defendants, who can ardently and effectively express their intolerance for intolerance through wholly constitutional means. Defendants are a well-financed, well-organized, major international institution with ease of access to numerous forms of media, both on and off campus; the inability to punish a student under the Speech Code would not interfere with their ability to express disapproval of any speech. (Order for Preliminary Injunction, pp. 35-36)

As he did when considering Stanford's compelled access argument, Judge Stone also rejected Stanford's argument that its right to academic freedom was restricted by the Leonard Law. As Judge Stone's order states:

> Defendants incorrectly suggest that "academic freedom" provides them with carte blanche to do what they wish. Both Regents of University of California v. Bakke (1977) 438 U.S. 265 and Sweezy v. New Hampshire (1967) 354 U.S. 234, cases relied upon by the Defendants, discuss academic freedom in the context of academic

> decisions. The Speech Code, however, has nothing to do with any of the four academic freedoms the Supreme Court has established. Defendants control all academic course work, admissions process, and residential activities; these forums are more than ample to put into effect Defendants' desired "standards of civility and respect" which they desire to encourage. (Order on Preliminary Injunction, p. 36)

In summary, Judge Stone reasoned that Stanford's own right to free speech was not unconstitutionally restricted by the Leonard Law because Stanford could express its views about offensive student conduct through means other than the Speech Code. In addition, he reasoned that Stanford's academic freedom under the First Amendment does not reach into the realm of regulating student speech in non-classroom settings. Judge Stone thus concluded that Stanford's contention that the Leonard Law infringes upon its freedom from expression was unpersuasive and failed to render the Leonard Law unconstitutional.

Stanford's Rights of Association

Stanford's fourth argument against the Leonard Law – that it impinged on the University's freedom of association by forcing it to associate with members (students) with whom it has no desire to associate – was met with similar disapproval by Judge Stone. In determining whether Stanford's right of association was violated by the Leonard Law, Judge Stone initially articulated the applicable rule. Citing to the United States Supreme Court decision in Board of Directors of Rotary Int'l v. Rotary Club (1987), Judge Stone stated that "the pertinent question is whether admitting the undesired members will affect the ability of the original members to express the view on which the organization was founded" (Order on Preliminary Injunction, p. 39). In making this determination, Judge Stone considered three factors: 1) whether there was a concern of state-sponsored viewpoint discrimination; 2) whether observers were likely to construe the offensive speech as an endorsement by the University of such views; and 3) whether Stanford had adequate means by which to rebut or separate itself from the offensive messages.

In addressing the first prong of this three-part test, Judge Stone accepted the argument of plaintiffs that the Supreme Court's decision in Pruneyard Shopping Center v. Robbins (1980) was applicable. In Pruneyard, a shopping center owner sought protection from Zionist picketers, alleging that a private property owner has a First Amendment right of expressive association not to be forced under California law to use his or her property as a forum for the speech of others with whom it may disagree (Pruneyard, 1980, p. 77). In sustaining the California law, the United States Supreme Court held that no specific message was directed by the State, and thus, fears of government viewpoint-based discrimination were non-existent (Pruneyard, 1980, p. 87). Judge Stone, noting the presence of the Stanford Shopping Center on University-owned property, stated that Corry was "identical to the Pruneyard situation" (Order on Preliminary Injunction, p. 41). More specifically, Judge Stone stated that, like the facts in Pruneyard, the plaintiffs "validly argue that California does not dictate any specific message through the Leonard Law, a situation which eliminates any concerns over government-sponsored viewpoint discrimination" (Order on Preliminary Injunction, p. 41).

Turning to the second prong of the test – whether an endorsement of the offensive speech would be perceived by observers – Judge Stone simply stated that Stanford "could easily disclaim any such wrongful attribution of a student's expression for those of the University" (Order on Preliminary Injunction, p. 41) and thus could make it clear that it did not endorse the speech.

Finally, addressing whether Stanford had adequate means to rebut or separate itself from the offensive message, Judge Stone reasoned that "by denying Defendants the ability to discipline (expel) students for violation of the Speech Code, Defendants' ability to express its message is not impaired because Defendants retain numerous alternative means of expressing their views" (Order on Preliminary Injunction, p. 39). He noted that Stanford was a well-funded institution with access to numerous alternative means of conveying its view that speech prohibited by the Speech Code is offensive.

In light of those three factors, Judge Stone concluded that "no sufficient nexus exists here which would affect Defendants' rights of association," rejecting Stanford's argument that the Leonard Law violated its rights of association. He thus rejected each of Stanford's four First Amendment-based arguments against the Leonard Law and upheld it as a legitimate exercise of legislative power.

Stanford University's Decision Not To Appeal

Stanford University President Gerhard Casper announced the University's decision not to appeal Judge Stone's Order in a March 9, 1995, speech to the Stanford Faculty Senate. Rather than fighting the decision, Casper stated that Stanford's "limited resources of money, time and attention are best kept applied to the central tasks of excellence and rigor in teaching, learning and research" (Walsh, 1995, p. 1).

Casper, however, was far from happy with the court's decision. He told the Faculty Senate that:

> It is ironic that, while opposing the University's rule on First Amendment grounds, the court endorsed the Leonard Law. I thought the First Amendment freedom of speech and freedom of association is about pursuit of ideas. Stanford, a private university, had the idea that its academic goals would be better served if

> students never used gutter epithets against fellow students. The California legislature apparently did not like such ideas, for it prohibited private secular universities and colleges from establishing their own standards of civil discourse. Religious institutions alone can claim First Amendment protection in this regard. However, I seem to be about the only person who finds that governmental intrusion troublesome and uncalled for. (Casper, 1995).

Thomas Grey, the Stanford Law School professor who penned the Interpretation, acknowledged Casper's reasons for not appealing the decision. Grey also noted that the case was "a public relations defeat for the University, and it's just not clear that that battle can be won" (Walsh, 1995, p. 7).

Ramifications

Depending on the perspective that one adopts, Judge Stone's Order upholding the Leonard Law in Corry may be viewed as either a victory or a defeat for First Amendment rights. From the perspective of the student plaintiffs in Corry, the decision clearly represents a victory for students' rights of free expression. In particular, it signals a victory for the students at Stanford University who, like the plaintiffs in Corry, may have felt a chilling effect on their expression during life under the Speech Code.[17] More generally, the case is also a victory for students at all private, non-religious universities in California who now may view the Leonard Law as a judicially approved tool for escaping the restrictions of existing speech codes and/or those codes that other schools may attempt to adopt in the future.

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[17] This is not to suggest, however, that *all* Stanford students were necessarily happy with the decision. Indeed, a number of students were involved in the movement to *create* the Speech Code after the racist incidents on campus described earlier in this paper (Cole, 1990).

From the perspective of the First Amendment rights of private universities and their administrators, however, the decision is anything but a triumph. In upholding the Leonard Law, Judge Stone gave short shrift to Stanford's First Amendment arguments and its claim to academic freedom. A private university's ability to express, via implementation of a speech code, its views about discriminatory student speech was dealt a potentially fatal blow. Furthermore, as noted above, Judge Stone suggested that academic freedom at private universities does *not* extend beyond the realm of course work and the admissions process. This narrow reading of academic freedom at private universities may represent an invitation for further state regulation of the academic and intellectual environment at private universities.

While slippery slope arguments are often fodder for ramification sections, Judge Stone's decision may indeed send a clear signal to the legislative bodies in California – and in other states – that they have more power than they thought to regulate speech and the intellectual environment at private universities. Given the large influx of conservative legislators across the country in the November, 1994 elections, statutes such as the Leonard Law may provide a politically expedient method for conservatives to strike a blow against the so-called political correctness movement that is often linked to speech codes and perceived as part of a liberal agenda. The lines between private universities and public universities may become further blurred in the event of additional legislation.

At this stage, however, it is too early to speculate about such floodgate arguments or to continue on with the parade of horrors that might result from the decision. Furthermore, whether Judge Stone's Order strikes the proper balance between the autonomy of private universities and the enhancement of student speech rights is subject to debate. At this point, however, what is clear is that the realm of academic freedom at private universities, at least those in

California, has suffered a significant blow and is smaller today than it was before the enactment of the Leonard Law and Judge Stone's decision in Corry. Conversely, the speech rights of private university students are significantly greater today than they were before Corry, and the potential for similar legislation in other states could further expand those rights. Ultimately, only time – and the future actions of legislators and courts – will determine the long-term impact of the Leonard Law.

References

Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987).

Brownstein, A. E. (1994). Hate speech and harassment: the constitutionality of campus codes that prohibit racial insults. William and Mary Bill of Rights Journal, 3, 179-217.

California Civil Code § 51 (West, 1982).

California Constitution, Article I, Section 2 (West, 1982).

California Education Code § 52 (West Supp., 1995).

California Education Code § 94367 (West Supp., 1995).

Casper, G. (1995, March 15). Casper: Fundamental Standard court case won't be appealed. Stanford Univeristy Campus Report, p. 13.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Cole, S. (1990). Beyond recruitment and retention: The Stanford experience. In Philip Altbach & Kofi Lomotey (Eds.) The racial crisis in American higher education (pp. 213-232). New York: SUNY.

Collin v. Smith, 447 F.Supp. 676, 690 (1978), affd. 578 F.2d 1197 (1978), cert. den. 439 U.S. 916 (1978).

Comments, Assembly Subcommittee on the Administration of Justice, July 10, 1991.

Complaint for Injunctive or Declaratory Relief, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, May, 1994).

Corry et al. v. The Leland Stanford Junior University, No. CV740309 (Sup. Court of Cal., Santa Clara County, Feb. 27, 1995)

Dambrot v. Central Michigan University, 839 F.Supp. 477 (E.D. Mich 1993).

Declaration of Plaintiff Robert J. Corry, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, May, 1994).

Declaration of Plaintiff Cyrus F. Rea III, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, May, 1994).

Declaration of Jennifer Westerlind in Opposition to Plaintiff's Motion for Preliminary Injunction, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, June, 1994).

Delgado, R., & Stefancic, J. (1994). Hateful speech, loving communities: why our notion of "a just balance" changes so slowly. California Law Review, 82, 851-869.

Defendants' Demurrer to Complaint for Injunctive or Declaratory Relief, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, June, 1994).

Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989).

Ebel, L. A. (1993). University anti-discrimination codes v. free speech. New Mexico Law Review, 23, 169-186.

Fleischer, S. (1994). Campus speech codes: the threat to liberal education. John Marshall Law Review, 27, 709-748.

Friedman, L. (1993). Regulating hate speech at public universities after R.A.V. v. City of St. Paul. Howard Law Journal, 37, 1-30.

Gill, A. M. (1993). Revising campus speech codes. Free Speech Yearbook, 31, 124-137.

Gitlow v. New York, 268 U.S 652 (1925).

Haiman, F. (1993). "Speech acts" and the First Amendment. Carbondale, Illinois: Southern Illinois University Press.

Leonard, J. (1993). Killing with kindness: speech codes in the American university. Ohio Northern University Law Review, 19, 759-800.

Lloyd v. Tanner Corp., 407 U.S. 551 (1972).

Marsh v. Alabama, 326 U.S. 501 (1946).

Matsuda, M. J., Lawrence III, C. R, Delgado, R., & Crenshaw, K. W. (1993). Words that Wound. Boulder, Colorado: Westview.

Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, June, 1994).

Memorandum of Points and Authorities in Support of Demurrer to Complaint for Injunctive or Declaratory Relief, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, June, 1994).

Memorandum of Points and Authorities Supporting Plaintiffs' Motion for Preliminary Injunction, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, May, 1994).

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

Nadel v. University of California, 22 Med. L. Rptr. 2481 (5th Dist. C.A., Cal., 1994).

Order on Preliminary Injunction, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, Feb. 27, 1995).

Pacific Gas & Elec. Co. v. Public Utility Commission, 475 U.S. 1 (1985).

Piarowski v. Illinois Community College Dist. 515, 729 F.2d 625 (7th Cir. 1986), cert. denied, 474 U.S. 1007 (1985)

Plaintiffs' Reply To Defendants' Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, 1994).

R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988), cert. denied, 488 U.S. 1043 (1989).

Regents of University of California v. Bakke, 438 U.S. 265 (1978).

Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985).

Roberts v. United States Jaycees, 468 U.S. 609 (1984).

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

Smith v. Goguen, 415 U.S. 566 (1974).

Smolla, R. A. (1992). Free speech in an open society. New York: Alfred A. Knopf.

Spence v. Washington, 418 U.S. 405 (1974).

Student Conduct Policies (1990). Stanford, CA: Office of the President, Stanford University.

Supplemental Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, Corry et al. v. The Leland Stanford Junior University et al., No. CV740309 (Sup. Court of Cal., Santa Clara County, 1994).

Sweezy v. New Hampshire, 354 U.S. 234 (1967).

Texas v. Johnson, 491 U.S. 397 (1989).

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

Turner Broadcasting Services, Inc. v. FCC, 114 S.Ct. 2445 (1994).

Turner, R. (1993). Hate speech and the First Amendment: the Supreme Court's R.A.V. decision. Tennessee Law Review, 61, 197-236.

United States v. O'Brien, 391 U.S. 367 (1968).

UWM Post, Inc. v. Board of Regents of University of Wisconsin, 974 F.Supp. 1163 (E.D. Wis. 1991).

Walsh, E. (1995, March 15). Casper explains speech policy decision. Stanford University Campus Report, pp. 1, 7.

Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993).

Wooley v. Maynard, 430 U.S. 705 (1977).

Appendix A

IX. Comments on the Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment

The following text was written by Professor Thomas Grey of the Stanford Law School. It serves to answer many questions about the purpose and scope of the new interpretation and is provided to the community by the 1990 Student Conduct Legislative Council.

The Fundamental Standard interpretation (see page 5) first restates, in Sections 1 and 2, existing University policy on free expression and equal opportunity respectively. Stanford has affirmed the principle of free expression in its Policy on Campus Disruption, committing itself to support "the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagree." The University has likewise affirmed the principle of non-discrimination, pledging itself in the Statement of Nondiscriminatory Policy not to "discriminate against students on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin in the administration of its educational policies." In Section 3, the interpretation recognizes that the free expression and equal opportunity principles conflict in the area of discriminatory harassment, and draws the line for disciplinary purposes at "personal vilification" that discriminates on one of the bases prohibited by the University's non-discrimination policy.

1. *Why prohibit "discriminatory harassment," rather than just plain harassment?*

   Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination – for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define *discriminatory* harassment as a separate violation of the Fundamental Standard.

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The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against any student in the administration of its educational policies on any arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time, these characteristics tend to make individuals the target of socially pervasive invidious discrimination. These characteristics thus tend to serve as the basis for *cumulative* discrimination: repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of the groups suffering such discrimination, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt or bruised feelings that result from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

2. *Does not "harassment" by definition require repeated acts by the individual charged?*

   No. Just as a single sexually coercive proposal can constitute prohibited sexual harassment, so can a single instance of vilification constitute prohibited discriminatory harassment. The reason for this is, again, the socially pervasive character of the prohibited forms of discrimination. Students with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination.

3. *Why is intent to insult or stigmatize required?*

   Student members of groups subject to pervasive discrimination may be injured by unintended insulting or stigmatizing remarks as well as by those made with the requisite intent. In addition, the intent requirement makes enforcement of the prohibition of discriminatory harassment more difficult, particularly since proof beyond a reasonable doubt is required to establish charges of Fundamental Standard violations.

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Nevertheless, we believe that the disciplinary process should only be invoked against intentionally insulting or stigmatizing utterances. The kind of expression defined in Section 4(c) does not constitute "insulting or 'fighting' words" unless used with intent to insult. For example, a student who heard members of minority groups using the standard insulting terms for their own group in a joking way among themselves might – trying to be funny – insensitively use those terms in the same way. Such a person should be told that this is not funny, but should not be subject to disciplinary proceedings. It should also not be a disciplinary offense for a speaker to quote or mention in discussion the gutter epithets of discrimination: it is using these epithets so as to endorse their insulting connotations that causes serious injury.

4. *Why is only vilification of "a small number of individuals" prohibited, and how many are too many?*

The principle of free expression creates a strong presumption against prohibition of speech based upon its content. Narrow exceptions to this presumption are traditionally recognized, among other categories, for speech that is defamatory, assaultive, and (a closely related category) for speech that constitutes "insulting or 'fighting' words." The interpretation adopts the concept of "personal vilification" to help spell out what constitutes the prohibited use of fighting words in the discrimination context. Personal vilification is a narrow category of intentionally insulting or stigmatizing discriminatory statements *about* individuals (4a), directed to those individuals (4b), and expressed in viscerally offensive form (4c).

The requirement of individual address in Section 4(b) excludes "group defamation"– offensive statements concerning social groups directed to the campus or the public at large. The purpose of this limitation is to give extra breathing space for vigorous public debate on campus, protecting even extreme and hurtful utterances in the *public* context against the potential chilling effect of the threat of disciplinary proceedings.

The expression "small number" of individuals in 4(a) is meant to make clear that prohibited personal vilification does not include "group defamation" as that term has been understood in constitutional law and in campus debate. The clearest case for application of the prohibition of personal vilification is the face-to-face vilification of one individual by another. But more than one person can be insulted face to face, and vilification by telephone is not (for our purposes) essentially different from vilification that is literally face to face.

For reasons such as these, the exact contours of the concept of insult to "a small number of individuals" cannot be defined with mechanical precision. One limiting restriction is that the requirements of 4(a) and 4(b) go together, so that a "small number" of persons must be no more than can be and are "addressed directly" by the person conveying the vilifying message.

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To take an important example, we believe that a racist or homophobic poster placed in the common area of a student residence might be found to constitute personal vilification of the African-American or gay students in that residence. Any such finding would, however, be context-specific, turning on the numbers involved, as well as on the evidence of the perpetrator's own knowledge and intentions.

5. *What is the legal basis for the concept of "insulting or 'fighting' words," and what is the concept's relation to the actual threat of violence on the one hand, and to the actual infliction of emotional distress on the other?*

In its unanimous decision in *Chaplinsky v. New Hampshire* (1942), the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" which are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." Along with libel and obscenity, this category was said to include "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

In subsequent opinions, the Court has consistently reaffirmed the basic *Chaplinsky* doctrine. At the same time, the Court has clarified the concept of "insulting or 'fighting' words" in two important ways. First, where the state attempts to punish speech for provoking violence, the threat of violence must be serious and imminent *(Gooding v. Wilson, 1972)*. Second, the "insulting or fighting words" exception does not allow prohibition of utterances offensive to the public at large, but must be confined to insults or affronts addressed directly to individuals, or thrust upon a captive audience *(Cohen v. California, 1971)*.

The Supreme Court's phrase "insulting or 'fighting' words" is often shortened to simply "fighting words," an expression which, while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations. First, the expression may imply that violence is considered an acceptable response to discriminatory vilification; but we prohibit these utterances so that disciplinary proceedings may substitute for, not supplement, violent response. Second, exclusive focus on the actual likelihood of violence might suggest that opponents of controversial speech can transform it into forbidden "fighting words" by plausibly threatening violent response to it – the so-called "heckler's veto." The speech, if it is to be subject to restraint, must also be grossly insulting by the more objective standard of commonly shared social standards. Finally, the "fighting words" terminology might be thought to imply that extreme forms of personal abuse become protected speech simply because the victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose an actual and imminent threat of violent retaliation. Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.

Another and largely overlapping category of verbal abuse to which legal sanctions may be applied is defined by the tort law concept of "intentional infliction of emotional distress." Much of the conduct that we define as discriminatory harassment might well give rise to a civil suit for damages under the "emotional distress" rubric. But that rubric has drawbacks as the legal basis for a discriminatory harassment regulation. It is less well established in free speech law than is the fighting words concept. Further, taken as it is from tort law, it focuses primarily on the victim's reaction to abuse; the question is whether he or she suffers "severe emotional distress." We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed.

6. ***What is included and excluded by the provision requiring "symbols ... commonly understood to convey direct and visceral hatred or contempt?"***

These terms in Section 4(c) provide the most significant narrowing element in the definition of the offense of discriminatory personal vilification. They limit the offense to cases involving use of the gutter epithets and symbols of bigotry: those words, pictures, etc., that are commonly understood as assaultive insults whenever they are seriously directed against members of groups subject to pervasive discrimination. The requirement that symbols must be "commonly understood" to insult or stigmatize, and so injure "by their very utterance," narrows the discretion of enforcement authorities; it means that particular words or symbols thought to be insulting or offensive by a social group or by some of its members must also be so understood across society as a whole before they meet the proposed definition.

The kinds of expression covered are words (listed, not exhaustively, and with apologies for the affront involved even in listing them) such as "nigger," "kike," "faggot," and "cunt;" symbols such as KKK regalia directed at African-American students, or Nazi swastikas directed at Jewish students. By contrast, a symbol like the Confederate flag, though experienced by many African-Americans as a racist endorsement of slavery and segregation, is still widely enough accepted as an appropriate symbol of regional identity and pride that it would not in our view fall within the "commonly understood" restriction. The direction of profanities or obscenities as such at members of groups subject to discrimination is also not covered by the interpretation, nor is expression of dislike, hatred, or contempt for these groups, in the absence of the gutter epithets or their pictorial equivalents.

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Making the prohibition so narrow leaves some very hurtful forms of discriminatory verbal abuse unprohibited. Substantively, this restriction is meant to ensure that no *idea* as such is proscribed. There is no view, however racist, sexist, homophobic, or blasphemous it may be in content, which cannot be expressed, so long as those who hold such views do not use the gutter epithets or their equivalent. Procedurally, the point of the restriction is to give clear notice of what the offense is, and to avoid politically charged contests over the meaning of debatable words and symbols in the context of disciplinary proceedings.

7. *Does not the narrow definition of vilification imply approval of all "protected expression" that falls outside the definition?*

Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit. The Stanford community can and should vigorously denounce many forms of expression that are protected against disciplinary sanction. For example, while interference with free expression by force or intimidation violates the Fundamental Standard, less overt forms of silencing diverse expression, such as too hasty charges of racism, sexism, and the like, do not. Yet the latter form of silencing is hurtful to individuals and bad for education; as such, it is to be discouraged, though by means other than the disciplinary process.

Similarly, while personal vilification violates the Fundamental Standard, even extreme expression of hatred and contempt for protected groups does not, so long as it does not contain prohibited insulting or fighting words, or is not addressed to individual members of the groups insulted. Yet such extreme expressions of hatred and contempt cause real harm. Members of the University community have every right to denounce them. At the same time, however, respect for the right of free expression – so critical to a university community – requires that students tolerate opinions which they find abhorrent. As stated in Section I, intimidation aimed at suppressing the exercise of this right through violence, or the threat of violence, constitutes a violation of the Fundamental Standard.

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

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TECHNICAL INNOVATION MEETS ECONOMIC AND FINANCIAL MONOPOLY: THE CLEAR CHANNEL GROUP AND THE CLEAR CHANNEL ISSUE, 1934-1941

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"The insurance business is dull compared to the radio business," Edwin W. Craig said. As vice president of both the National Life and Accident Company and Nashville's radio station WSM, Craig knew both professions. His father had started National Life and Accident, and in 1913 the younger Craig began selling industrial insurance. In 1925, the company founded WSM, in the belief that operating a radio station would be a good way to promote its life and accident insurance. The station's call letters were no accident: they stood for "We Shield Millions."[1]

In 1934, Ed Craney, the owner of KCCP in Seattle, Washington, a station operating during the day on WSM's clear channel frequency, asked Craig for permission to broadcast full-time. This was in keeping with existing Federal Communications Commission regulations, which allowed the dominant clear channel station to consent to such a duplication. Craig consulted his chief engineer, John H. DeWitt, who drew up a technical study showing that KCCP's nighttime operation would disrupt WSM's signal.[2]

Craig refused Craney's request but knew that would not be the end of the matter. Already, Washington state's two senators had buttonholed Tennessee Senator Kenneth McKeller, urging him to pressure WSM into consenting to the duplication. In addition, requests for duplications of other clear channels were pending, and Mexico had announced in April 1934 that it would authorize full-time stations on nineteen U.S. clear channels. The clear channels, it seemed to Craig, were under assault from all sides.[3]

With this in mind, Craig spearheaded the formation of the Clear Channel Group (CCG) in 1934. Designed to pool the resources of clear channel stations and to promote the cause of clear channels, the CCG until 1941 would spearhead the drive to preserve the clear channel stations and raise their power. The clear channel debate did not end with the group's demise, and in fact carried on until the 1980s. In 1941, however, the CCG gave way to another group, the Clear Channel Broadcasting Service (CCBS), which continues to operate today.

The idea that there should be an elite group of more powerful radio stations to provide rural service is almost as old as radio broadcasting itself. The concept of clear channels was formalized in the Federal Radio Commission's 1928 frequency allocation plan, which designated forty of the AM band's ninety-six frequencies for the exclusive use of one station at night. Between sunset and sunrise, AM signals can travel hundreds--in some cases thousands--of miles on a clear frequency. Dominant clear channel stations were allowed to use the highest power available to any station, 50,000 watts, in an effort to provide reliable radio service to listeners in remote areas. Less powerful stations that were authorized to broadcast on clear channels during the day had to sign off at night to avoid interfering with the dominant station's signal.

Despite the existing clear channel structure, not everyone believed that putting powerful stations on clear frequencies was the best way to serve rural radio listeners. Smaller broadcasters argued that it would be better to put more stations on each frequency, thus allowing rural listeners to hear local programming, rather than signals from a far-off city. As clear channel stations began to push for what came to be called "superpower"--500,000 or even 750,000 watts--smaller stations argued that increasing the clears' power would siphon revenue away from them, as advertisers would flock to the more powerful stations.

Considering the importance of the clear channel issue to the development of AM radio, remarkably little has been written about it.[4] Histories of broadcasting tend to address clear channels briefly if at all, and the debate over FCC policy on clear channels is rarely discussed in any depth.[5]

This study examines the clear channel issue as it developed from 1934 to 1941, concentrating on the activities of the Clear Channel

Group. The main primary sources for the study are the papers of the organization, which are located at the law offices of Wiley, Rein and Fielding in Washington, D.C. This material, which includes legal documents, internal memos and personal correspondence, has never before been accessed by a researcher. In addition, several interviews were conducted with key CCG and CCBS personnel, and numerous FCC documents were accessed.

Examining the debate over clear channels that took place during this time provides important information at several levels. The development of clear channel policy shows how important the rural constituency was, with both sides in the debate couching their arguments in agrarian rhetoric, and it also shows the preoccupation against creating monopolies of the public trust. Years before the FCC's 1941 Report on Chain Broadcasting, concentration of power was an issue in the clear channel case. The issue of localism, which would later arise in many battles over electronic communication, also was argued in the clear channel debate. Finally, the Clear Channel Group was one of the first of what Erwin Krasnow has called the "specialized trade organizations" formed to pursue the specific interests of a group of broadcasters.[6] As such, examining its operation provides important insight into how such groups functioned in the early days of radio.

In the end, the Clear Channel Group fought to what was essentially a draw. It was unable to win superpower for clear channel stations, but it did preserve much of the existing clear channel structure. As the debate over clear channels continued after World War II, it would focus on the same issues--monopoly, localism and the rural audience--that originated during the CCG's tenure.

Formation of the Clear Channel Group

The first meeting of the Clear Channel Group was held in Chicago on May 9, 1934. Representatives of several clear channel stations were already in the city for an advertising meeting, and Craig decided to call them together to talk about the clear channel situation.[7] He was subsequently elected chairman of the organization, a position he held throughout the life of the CCG. Any clear channel station not owned or operated by a network was eligible to join, and the following thirteen did:

KFI	Los Angeles, California
KNX	Hollywood, California
WBAP	Ft. Worth, Texas
WFAA	Dallas, Texas
WGN	Chicago, Illinois
WHAM	Rochester, New York
WHAS	Louisville, Kentucky
WJR	Detroit, Michigan
WLS	Chicago, Illinois
WLW	Cincinnati, Ohio
WOAI	San Antonio, Texas
WSB	Atlanta, Georgia
WSM	Nashville, Tennessee[8]

Two eligible stations, WWL in New Orleans and KSL in Salt Lake City, chose not to join the group initially, although WWL later became a member. One of the members of the group, WLW, had received special permission from the Federal Radio Commission (FRC) in 1932 to use 500,000 watts of power, ten times the normal limit. The purpose of the "experimental" license, according to the FRC, was to determine if increased power could improve service to rural areas.[9] In early 1934, WLW began broadcasting full-time with 500,000 watts on its 700-kHz frequency.

The group hired Washington attorney Louis Caldwell, a former general counsel for the Federal Radio Commission who was acknowledged by many as the foremost authority on communications law.[10] By the time of his involvement with the CCG, Caldwell had already built a successful law practice based mostly on a clientele of large broadcasting outlets.[11] His retention by the CCG was illustrative of a theme that recurred throughout the clear channel debate and indeed throughout broadcast regulation in general: many of the lawyers representing various interests had once worked for the commission. Not to be outdone, when the National Association of Regional Broadcast Stations (NARBS) formed in 1936 to oppose the CCBS, it hired Paul D.P. Spearman, a former Federal Radio Commission lawyer. Krasnow later described as "perilously thin" the line that purported to separate the commission from the industry it regulated, and that line was particularly narrow in the clear channel debate.[12]

With Caldwell's help, Craig drew up a petition and distributed it among the group's members before submitting it to the FCC on August 7, 1934. It noted that nine clear channels had already been duplicated at night and called for an investigation of the clear channel situation.[13] The FCC obliged, ordering a study of the broadcast band, especially as it related to clear channels. In addition to technical studies, the FCC also authorized a postcard survey to gauge rural listening habits. Nearly 106,000 questionnaires were sent out, with respondents selected from lists provided by the Department of Agriculture.[14] "Name your favorite radio station by call letters in order of your preference," listeners were instructed.[15]

More than 32,000 questionnaires were returned, and the results showed that 76.3 percent of listeners relied primarily on clear channel stations for their radio entertainment. "The general conclusion," the report said, "was that the average rural listener is dependent upon. . . clear channel stations, frequently hundreds of miles away."[16] The survey also indicated that WLW, with its 500,000 watts of power, had particularly impressive coverage of the rural population. The station was the first choice of listeners in thirteen states from Michigan to Florida. According to the commission, the survey demonstrated "the effectiveness of the use of higher power in extending the coverage and rendering increased service to rural listeners."[17] The results gave the CCG cause for celebration, and Caldwell told members that the survey would be an important weapon in the upcoming hearings:

> While the facts set forth in the survey are, or ought to be, a matter of common knowledge and common sense, this is the first time they have been proved; this is of immeasurable advantage in freeing the issues of loose claims and political considerations.[18]

The repeal of the Davis Amendment in June 1936 opened up new options for the FCC in allocation and station power. The amendment, attached to the Radio Act of 1927, required radio licenses to be distributed equally among five zones of the country. Its intent was to avoid a clustering of stations in the Northeast, but in reality the provision proved unworkable. Its repeal gave the FCC had a freer hand in distributing stations, power and frequencies.[19]

By this time, fourteen stations had applied for superpower permits, and Powel Crosley, the owner of WLW, was pushing to have his experimental authorization made permanent.[20] In response, the FCC announced its intention to collect information on allocation, "not only in its engineering but also in its corollary social and economic phases."[21] The commission cited several reasons for such an inquiry:

> The increase in demand for broadcast facilities, the need for local broadcast service in many communities which do not now

> have local broadcast stations, and the technical improvements. . . have convinced many in the industry that improvements and changes in allocation could and should be made.[22]

The FCC scheduled hearings on the matter to begin in October 1936.

Preparation for the 1936 Hearings

With the announcement of the upcoming hearings, the CCG began to prepare its case. A three-man committee started working on engineering studies, and a Washington consulting firm was hired to help. The group authorized a budget of $25,000, with the money to be raised by assessing each member station monthly "dues" of $125.[23] Caldwell, now assisted by an additional lawyer, began preparing the group's defense of clear channels.

From the beginning, member stations pooled their resources to gather technical data. During the summer, the engineering committee enlisted station cooperation to perform six nights of signal strength studies on duplicated channels. At a June meeting of the chief engineers of CCG stations in Chicago, Caldwell asked member stations for a list of any measuring apparatuses, surveys or mail analyses they might have to contribute to the cause.[24]

As the engineering group continued to work on proving the value of clear channels from a technical standpoint, it became clear that engineering data would not be the only issue. Just eleven days before the hearings were scheduled to begin, Caldwell warned members that a broader context would need to be considered in defending the clear channels:

> From information coming to us from various sources, it is becoming increasingly obvious that economic and social issues are going to prove just as important at the October 5th hearing as technical issues and perhaps more important.[25]

The emphasis on non-technical issues would have important implications for the CCG and the development of radio in general. For the CCG, it meant a major shift in emphasis. Clear channel proponents had always maintained that their position was technically sound, and throughout the clear channel debate they believed that engineering data provided their strongest argument. The shift away from purely technical issues and toward a more socially and economically conscious debate took away the clear channels' most important weapon. The CCG could produce scores of engineering reports and field studies to show that high-powered clear channel stations could provide effective rural coverage, but defending against charges of adverse social and economic effects was more difficult.

Despite the fact that most of the group's members had applied for power in excess of 50,000 watts, there was considerable discussion at planning meetings over whether it should promote superpower. Unable to reach a strong consensus, the executive committee passed a nebulous resolution:

> the minimum power required of clear channel stations should not be in excess of 50 kw., this resolution not to be construed as opposing the application of any station for power in excess of 50 kw., or the amendment of the Commission's regulations so as to permit the granting of such an application.[26]

The resolution would guide the group's testimony throughout the hearings, as Caldwell and others concentrated on defending the value of clear channels for providing rural coverage while leaving the door to superpower open. If stations wished to pursue higher power, they would be free to do so on an individual basis.

The Clear Channel Group was not the only organization planning to present testimony at the 1936 hearings. At least three groups representing local or regional stations had come together as well, most notably NARBS, led by John Shepard III, chairman of WNAC in Boston and president of the Yankee Network. In the months before the hearings Caldwell attempted to find out more about the group, but at first complained that he could learn no more about it than what he read in Broadcasting magazine.[27] Eventually, however, he was able to secure a set of the organization's memoranda and financial information. "Stripped of verbiage," Caldwell informed CCG members, NARBS's goals were the breakdown of clear channels, power increases for regional stations and the rejection of superpower for clear channel stations. Caldwell also said that he had been told that not all regional stations agreed with the objectives of NARBS, and that the group might not be able to present "a unified front." Nonetheless, the Clear Channel Group would have to prepare rebuttals to NARBS's testimony, and each member station was assessed an additional $120 in September 1936 to cover the additional expenses.[28]

Allocation Hearings of 1936

The topics of clear channels and superpower dominated the allocation hearings held from October 5 to October 20, 1936, at the FCC's offices. Forty-five witnesses appeared, presenting more than 1,700 pages of testimony. "Practically every group of broadcast stations having a particular problem that is separate and distinct from the problems facing the industry as a whole was represented and presented testimony," the FCC noted.[29]

Craig testified for the CCG, promoting clear channels as the only practical way to serve the vast rural areas of the country. He cited a 1932 Federal Radio Commission survey that noted that only 46 percent of the total area of the United States had satisfactory nighttime radio reception and the FCC's recent postcard survey that showed the great degree of rural dependence on clear channel stations. The only way to serve the rest of the population, he argued, was by increasing the number of clear channels and perhaps the power of clear channel stations. He stopped short of advocating superpower, but advised against maintaining the present 50,000-watt limit.[30]

Craig also spoke to concerns about social and economic concentration of power. He noted that as long as stations were under independent ownership, which, of course, CCG members were, there was no danger of monopoly. He defined independent ownership as "not merely the absence of network ownership, but the presence of ownership by people who are in and of the community or region in which the station is located, and which it primarily serves as contrasted with absentee ownership or control."[31]

Spearman testified on behalf of NARBS, which opposed superpower and called for the protection of regional stations as the "backbone of American broadcasting."[32] Spearman criticized the FCC's postcard survey, calling the results "superficial and open to question."[33] He said that if clear channel stations were allowed to increase their power, it would hamper smaller stations' ability to attract national spot advertising and cause networks to drop small affiliates in favor of the increased audience of clear channel stations. While admitting that there was a large portion of the country without nighttime radio coverage, Spearman contended that the best way to bring service to these areas was by the duplication of the clear channels.[34]

WLW's Powel Crosley also testified, as did J.O. Maland of WHO in Des Moines. Both advocated superpower for clear channel stations, and downplayed the possibility of adverse economic or social effects. William S. Paley, president of CBS, urged caution on superpower, saying his network would be forced to drop "any stations which lay within the primary service area of each new superpower station." Nonetheless, he vowed that if the FCC approved superpower, CBS would seek a full complement of superpower licenses for the stations owned by the network.[35] Lenox R. Lohr, president of NBC, testified that 500,000-watt stations would be beneficial to the public and doubted they would have any serious effect on the networks. He too, however, urged caution in granting superpower licenses.[36] Representatives from the Radio Manufacturer's Association and the Institute of Radio Engineers testified in favor of superpower, seeing it as a logical progression of the radio art.[37]

While a consensus on superpower did not emerge from the hearings, most observers felt that a case had been made for at least a limited expansion of high-power stations. "All signs point to an eventual lifting on the limit of power," said Broadcasting; Business Week predicted that the clear channel stations were "virtually assured" of getting superpower.[38]

The FCC hired an economics professor from the University of Pennsylvania, Herman S. Hettinger, on a thirty-day retainer to analyze the data presented at the hearings.[39] At first, Caldwell opposed Hettinger's selection because the professor had once worked for NARBS. "I have no doubt as to Hettinger's integrity," he wrote. "but [I am] apprehensive of unconscious bias on his part in making findings on issues affecting groups by which he has been employed."[40] But after a meeting in early January 1937 with T.A.M. Craven, the FCC's chief engineer, Caldwell decided not to protest. Craven assured Caldwell that he would be able to go over the report and "make corrections" if necessary. Hettinger's report, presumably with Caldwell's corrections, became a part of the FCC's 1938 Report on Economic and Social Data Pursuant to the Informal Hearing on Broadcasting. Caldwell also was shown a preliminary draft of the FCC Engineering Department's report on the October 1936 hearings and advised CCG members that it was "favorable to its contentions on all important issues."[41]

The final version of the engineering department's report, released on January 14, 1937, made few concrete recommendations. It did propose a new six-category classification system for stations, essentially splitting the clear channel category into two groups. The first group (later designated as "I-A") would contain unduplicated clear channel stations, while the second (later designated as "I-B") would contain duplicated clear channel stations. The CCG did not object to these classifications, presumably because a number of clear channel frequencies had already been duplicated and thus would become Class I-B stations.[42]

Havana and Washington: NARBA and New Allocations

The North American Regional Broadcasting Conference was scheduled to begin in Havana, Cuba, in November, 1937, and the CCG elected to send Caldwell to represent the American clear channels' cause. The Havana meeting was called to standardize radio communications throughout the Americas, with the United States, Canada, Cuba, the Dominican Republic, Haiti and Mexico participating. Prior to the conference, there were no formal agreements that required countries to the south of the United States to respect U.S. allocations. Canada and the United States had a bilateral agreement, but there were numerous incidents of interference problems from other countries' stations, particularly Mexico and Cuba.[43] The FCC was delaying any action in its ongoing allocation studies pending the outcome of the conference, and it was likely that the agreement reached in Havana would have a substantial impact on the future development of the AM band in the United States.[44]

The CCG had essentially decided to support the same policy as the FCC at the conference, namely:

> [A]n equitable solution for these serious international problems without. . . [it] being incumbent upon the United States to give up a single station, to change its plan of allocation, or to reassign operating frequencies in such a manner as to result in a material loss of service.[45]

The CCG also opposed any deterioration in the definition of clear channels and wanted to prevent power limitations on clear channels.[46] Concerning the latter, the group had reason to expect success: Mexico had already authorized several stations using as much as 850,000 watts, and Cuba had plans for high-power stations as well.

An agreement, which came to be known as the North American Regional Broadcasting Agreement (NARBA), was reached in Havana on December 13, 1937, but did not become operative until March 29, 1941, one year after all of the participants had ratified it. Mexico, after much delay, was the last to approve it, and eventually the Bahamas and Newfoundland signed on as well. The pact divided the 106 channels from 550 to 1600 kHz into three classes: fifty-nine clear channels, forty-one regional channels and six local channels. Station classes were essentially the same as those recommended in the FCC's 1937 engineering report with one important difference: Class I-A stations were authorized to use a minimum of 50,000 watts with no maximum imposed, just as the CCG had sought.

Of the fifty-nine designated clear channels, the United States was granted priority on up to thirty-two. The U.S. was free to designate any number of them as either Class I-A or I-B. The difference in the two classifications dealt with allowable power and the degree of protection from interference: I-A stations, as stated, had no power limit, and their signals would be protected within the entire land area of their country; I-B stations could use no more than 50,000 watts, and their signals were protected to a lesser degree.[47] Thus, if the United States designated a clear channel as I-A, the station on that frequency would be allowed to use unlimited power and would receive greater protection from interference under the treaty.

The Clear Channel Group now had an incentive to actively advocate power in excess of 50,000 watts for its member stations. Any station that could achieve power authorization of more than 50,000 watts would by definition have to be a I-A station under the Havana agreement, and thus could secure greater protection for its signal. But if only a 50,000-watt station was operating on a particular U.S.-priority frequency, that frequency could conceivably be given the lesser I-B status.[48]

There was still debate within the group, however, over the degree to which it should pursue higher power. Caldwell believed advocacy of superpower was the best way to promote the value of clear channels:

> [F]ailure to urge [superpower] may have a very prejudicial effect on the clear channel issue. The seriousness of the attack on clear channels must not be under-estimated. . . . The best defense against duplication consists in the showing of future possibilities of use of clear channels with increased power.[49]

Once again taking a compromise position, the CCG decided to merely pursue 50,000 watts as a minimum power.

With the Havana Agreement--albeit not yet ratified--in hand, and the numerous reports from the 1936 hearings completed, the FCC scheduled another hearing in June 1938 to discuss allocation matters. In a veritable replay of the 1936 hearings, the three-man broadcast committee of the FCC listened to the pros and cons of clear channels and superpower, as well as other allocation issues.

Part way through the hearings, however, Senator Burton K. Wheeler, a Democrat from Montana and long-time critic of clear channels, was able to secure the passage of a Senate resolution opposing power in excess of 50,000 watts. While it did not carry the force of law, it was highly unlikely that the FCC would go against it. Caldwell implied that Wheeler strong-armed his colleagues into supporting the resolution by threatening to kill the Havana Treaty if it did not pass. He noted that the resolution put the Clear Channel Group in a awkward position:

> It does not have the effect of law but undoubtedly the Commission will treat it as a command. It seems inadvisable to take any steps in the name of the group to oppose adoption of the Resolution for the present because of the possible adverse effect on the Treaty.[50]

In June 1939, the FCC decided to provide for twenty-five Class I-A clear channels but retained the power limit of 50,000 watts. WLW's experimental superpower license also was discontinued. A report released by the broadcast committee summarized the commission's feelings:

> The evidence shows conclusively that, from a technical standpoint, the use of power in excess of 50 kw has a distinct advantage because it provides better quality service to the vast population residing in rural areas and in towns which neither have broadcasting stations of their own nor are located within the primary service areas of any station. . . . [However], the evidence to date is far too meager to warrant this Commission's advocating super power as the only means of improving service to the rural listeners of the nation.[51]

The commission, of course, had to consider Wheeler's Senate Resolution as well.

The Clear Channel Group saw the result of the FCC's action as a mixed blessing. The concept of clear channels had survived the opposition from rival groups, but superpower was again put on hold. Caldwell told member stations that the outlook for clear channels was rather bleak:

> [S]erious consideration has been given by the Commission to further reduction in the number of clear channels to 20 as well as a proposal which would have opened all channels to applications for duplicating facilities. . . . The question is, therefore,

not closed.[52]

Caldwell was right: the debate about clear channels was far from over.

Conclusion

The Clear Channel Group continued to operate until 1941. At that time, it was supplanted by the Clear Channel Broadcasting Service, composed of largely the same members and seeking the same goals as the CCG. The CCBS, however, was a more ambitious undertaking, maintaining an office and full-time director in Washington, D.C., lobbying extensively in Congress and at the FCC, and promoting public and farm goodwill toward clear channels.

After World War II, the FCC again tackled the clear channel issue. Finally, after years of hearings, lobbying and technical studies, the commission decided in 1961 to duplicate thirteen of the 25 Class I-A clear channels. In 1980 the remaining clear channels were duplicated. The debate over clear channels and superpower that had begun in the 1930s was finally over.

The concept of a clear channel had been recognized since the early 1920s. To facilitate increased rural service, power limits were revised upward as the technology to transmit with 5,000, 25,000 and 50,000 watts was developed. At one point, however, the power and area of coverage reached such a level that the concepts of clear channels and rubber-stamp power increases were called into question for social and economic reasons. That point was the WLW experiment.

The Cincinnati station's experimental authorization for 500,000 watts from 1934 to 1939 showed that higher power could bring better service to rural areas, but at the same time questions arose about economic, social and political monopoly. Matters were not helped by WLW's aggressive promotional activities, which at times seemed more intent on braggadocio than promoting rural coverage.

The issues addressed from 1934 to 1941 foreshadowed a series of important issues in both the clear channel debate and other areas of radio regulation. The FCC's 1936 broadcast hearings marked the emergence of social, political and economic factors over purely engineering concerns. It was no longer enough to merely have the technical ability to broadcast with higher power, other issues would have to be considered as well. The concerns over monopoly power, which are most often traced to 1941's Report on Chain Broadcasting, were actually played out before World War II in the clear channel debate. Localism also played a prominent role in the issue, as the FCC ultimately decided to pursue a clear channel course that preserved more local voices at the expense of regional powers.

The CCG was able to show that clear channel stations using superpower could, from a technical standpoint, provide better rural radio service, but it was not able to overcome the fear of monopoly that accompanied that service. The group did, however, establish itself as a voice for clear channel interests and provided a model for later broadcasting lobbies. For that, Edwin Craig's brainchild was certainly a pioneer in the development of broadcast regulation.

NOTES

1. See John H. DeWitt, telephone interview by author, August 8, 1993; and Cornelius A. Craig, telephone interview by author, July 23, 1993 and March 30, 1994.

2. See R. Russel Eagan to Hollis M. Seavey, April 3, 1956, Box 1696, Wiley Rein and Fielding Law Offices, Washington, D.C. (hereafter referred to as WRF Files); and John DeWitt, telephone interview by author, August 8, 1993.

3. Eagan to Seavey, April 3, 1956, Box 1696, WRF Files.

4. See George Harry Rogers, *The History of the Clear Channel and Super Power Controversy in the Management of the Standard Broadcast Allocation Plan* (Ph.D. Dissertation, University of Utah, 1972); Eric F. Brown, *Nighttime Radio for the Nation: A History of the Clear Channel Proceeding, 1945-1972* (Ph.D. Dissertation, Ohio University, 1975); Lawrence W. Lichty, *The Nation's Station: A History of Station WLW* (Ph.D. Dissertation, Ohio State University, 1964); and Jeffrey Smulyan, "Power to Some People: The FCC's Clear Channel Allocation Policy," *Southern California Law Review* 44 (1971): 811.

5. See Gleason L. Archer, *History of Radio to 1926* (New York: The American Society, Inc., 1938); John C. Baker, *Farm Broadcasting: The First Sixty Years* (Ames: Iowa State University Press, 1981); Erik Barnouw, *A Tower in Babel: A History of Broadcasting in the United States to 1933* (New York: Oxford University Press, 1968); Erik Barnouw, *The Golden Web: A History of Broadcasting in the United States, 1933-1953* (New York: Oxford University Press, 1968); Murray Edelman, *The Licensing of Radio Services in the United States, 1927 to 1947* (Urbana, Ill.: University of Illinois Press, 1950): Walter Emery, *Broadcasting and Government* (East Lansing: Michigan State University Press, 1969); Harvey J. Levin, *The Invisible Resource: Use and Regulation of the Radio Spectrum* (Baltimore: Johns Hopkins Press, 1971); Robert Sears McMahon, *Federal Regulation of the Radio and Television Broadcast Industry in the United States, 1927-1959* (New York: Arno Press, 1979); Philip Rosen, *The Modern Stentors: Radio Broadcasters and the Federal Government, 1920-1934* (Westport, CT: Greenwood Press, 1980); Laurence F. Schmeckbier, *The Federal Radio Commission: Its History, Activities and Organization* (Washington, D.C.: The Brookings Institute, 1932); Charles A. Siepmann, *Radio's Second Chance* (Boston: Little, Brown and Company, 1946); Elmer E. Smead, *Freedom of Speech by Radio and Television* (Washington, D.C.:

Public Affairs Press, 1959); and Christopher H. Sterling and John M. Kittross, Stay Tuned: A Concise History of American Broadcasting (Belmont, CA: Wadsworth Publishing Company, 1990).

6. Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1973), 35.

7. There is no record of which stations had representatives at this meeting.

8. Eagan to Seavey, April 3, 1956, Box 1696, WRF Files.

9. Federal Communications Commission, In the Matter of the Application of the Crosley Corporation, 6 FCC 798 (1939).

10. "Death of Louis G. Caldwell," Journal of the Federal Communications Bar Association 12 (Spring 1952): 60-1.

11. Ibid., 366.

12. Krasnow and Longley, The Politics of Broadcast Regulation, 32.

13. None of the duplications affected members of the Clear Channel Group.

14. "FCC Getting Data on Clear Channels," Broadcasting, February 1, 1935, 40.

15. "First Analysis of Rural Listening Habits," Broadcasting, September 15, 1936, 7.

16. Federal Communications Commission, FCC Reports (Washington, D.C.: U.S. Government Printing Office, 1935), 30-31.

17. Ibid., 65-66.

18. Clear Channel Group, "Report No. 8," September 18, 1936, Box 1696, WRF Files.

19. See U.S. Congress, House, Committee on Interstate and Foreign Commerce, Regulation of Broadcasting: Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action, 85th Congress, 2d Session, 1958, 17-8; Federal Communications Commission, FCC Reports (1936), 58; and "Davis Amendment Repeal Lifts Quota Bar," Broadcasting, June 15, 1936, 13.

20. "WGY, KSL Apply for 500,000 Watts," Broadcasting, October 15, 1936, 64.

21. "Whys-Hows of Reallocation Hearings," Broadcasting, August 1, 1936, 11.

22. Federal Communications Commission, Annual Report (Washington, D.C.: U.S. Government Printing Office, 1937), 40.

23. Eagan to Seavey, April 3, 1956, Box 1696, WRF Files.

24. See Clear Channel Group, "Engineering Report," July 14, 1936; and "Report No. 3," June 27, 1936, both in Box 1696, WRF Files

25. Clear Channel Group, "Report No. 11," September 23, 1936, Box 1696, WRF Files.

26. Clear Channel Group, "Report No. 4," July 14, 1936, Box 1696, WRF Files.

27. Clear Channel Group, "Report No. 5," July 21, 1936, Box 1696, WRF Files.

28. See Clear Channel Group, "Report No. 6," August 11, 1936; "Report No. 12," September 24, 1936; and "Report No. 14," November 5, 1936, all in Box 1696, WRF Files.

29. Federal Communications Commission, Annual Report (Washington, D.C.: U.S. Government Printing Office, 1937), 42.

30. Federal Communications Commission, Report on Economic and Social Data Pursuant to the Informal Hearing on Broadcasting (Washington, D.C.: U.S. Government Printing Office, 1937), 83.

31. Ibid., 84.

32. Ibid., 92.

33. Ibid., 93.

34. Ibid., 94-7.

35. Ibid., 101-2.

36. Ibid., 98-99.

37. See "RMA for Sponsorship on Short Waves," and "IRE Favors 500 kw on Clear Channels," both in Broadcasting, October 15, 1936, 58.

38. See "Joint Hearing on Superpower May Result from 500 kw Pleas," Broadcasting, May 15, 1936, 16; and "That Radio Channel Plan is Here," Business Week, January 13, 1937, 38.

39. "Creation of Economic Sections in the FCC Again Indicated," Broadcasting, January 1, 1937, 10.

40. Clear Channel Group, "Report No. 16," January 15, 1937.

41. Ibid.

42. See "Preliminary Engineering Report on Allocations," Broadcasting, January 15, 1937 (supplement); and Federal Communications Commission, Report on Economic and Social Data, 51.

43. Federal Communications Commission, Annual Report (Washington, D.C.: U.S. Government Printing Office, 1938), 55.

44. See Clear Channel Broadcasting Service, Summary History of Allocation in the Standard Broadcast Band (Washington, D.C.: Press of Byron S. Adams, 1948): 51; and Clear Channel Group, "Report No. 18," March 26, 1937, Box 1696, WRF Files.

45. Federal Communications Commission, Annual Report (Washington, D.C.: U.S. Government Printing Office, 1938), 55.

46. Clear Channel Group, "Report No. 20," April 30, 1937, Box 1696, WRF Files.

47. Clear Channel Broadcasting Service, Summary History of Allocation, 52-4.

48. Clear Channel Group, "Report No. 31," March 14, 1938, Box 1696, WRF Files.

49. Ibid.

50. Clear Channel Group, "Report No. 41," June 10, 1938, Box 1696, WRF Files.

51. Quoted in Clear Channel Broadcasting Service, Summary History of Allocation, 47.

52. Clear Channel Group, "Report No. 53," June 23, 1939, Box 1696, WRF Files.

Alachua Free-Net: Looking for the First Amendment at One Outpost on the Information Highway

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Presented to the Law Division
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Washington, D.C.
August 9-12, 1995

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A growing number of communities across the country are developing civic computer networks to provide citizens with free access to local information resources and the Internet. However, most of these networks restrict both commercial speech and any language deemed "objectionable." Whether such broad discretionary power violates the First Amendment depends on whether the networks are state actors. An examination of one such network, Alachua Free-Net, reveals a close symbiotic relationship between the network and several local government entities. Symbiotic relationships between the state and a private party in other contexts have been held by the courts to constitute state action. Thus, Alachua Free-Net appears to be a state actor and must conform its speech restrictions to the requirements of the First Amendment. Moreover, whether state actors or not, civic computer networks such as Alachua Free-Net should commit themselves to providing full First Amendment freedoms to their users.

Alachua Free-Net: Looking for the First Amendment at One Outpost on the Information Highway

I. Introduction

Seventy-six years ago, Justice Oliver Wendell Holmes suggested that the best test of truth is "the ability of an idea to get itself accepted in the competition of the market."[1] Today, however, critics argue that unequal access to the market puts truth at a disadvantage.[2] In general, one must pay for access to traditional mass media such as newspapers, magazines, and broadcasting. When a television network charges one million dollars for thirty seconds of airtime, the cost of access to the marketplace is high indeed.[3]

Computer networks are creating a new medium in the marketplace, one with distinct advantages over print and broadcasting. Individuals can quickly and economically communicate to a mass audience via computer networks, and the audience can respond in kind.[4] Computer networks also allow users to access an almost limitless supply of information.[5] More than 20 million people worldwide connect to the Internet through computer networks, and this number is growing exponentially.[6]

Many individuals gain access to the Internet through a university or the workplace. Others pay for access through national commercial networks such as Prodigy™ and Compuserve™.[7] In recent years some communities have developed civic computer networks known as "Free-Nets" to provide local residents with free access to both the Internet and local information resources.[8]

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[1] *Abrams v. United States* 250 U.S. 616, 630 (1919), (Holmes, J., dissenting).

[2] See Ben Bagdikian, The media monopoly (4th ed.) Boston: Beacon Press (1992); Noam Chomsky, Necessary illusions: Thought control in democratic societies Boston: South End Press (1989); Herbert Schiller, Culture, Inc.: The corporate takeover of public expression NY: Oxford University Press (1989).

[3] The reported price charged by ABC for a thirty-second commercial during Superbowl XXIX in January, 1995. "Advertising's superday," The St. Petersburg Times 22 Jan. 1995: H11.

[4] Harley Hahn & Rick Stout, The Internet complete reference Berkeley: Osborne McGraw-Hill (1994).

[5] Paul Gilster, Finding it on the Internet NY: John Wiley & Sons (1994).

[6] The number of Internet users is expected to double by the end of 1995. Richard Wiggins, The Internet for everyone: A guide for users and providers NY: McGraw-Hill (1995).

[7] Hahn & Stout.

The first Free-Net began operation on July 16, 1986 in Cleveland, Ohio. The Cleveland Free-Net grew out of a project at Case-Western University to provide the general public with free access to medical information via a computer network.[9] In 1989 the National Public Telecomputing Network (NPTN) was formed as a non-profit organization dedicated to helping other communities set up "Free-Nets".[10] Today there are 46 Free-Nets operating and more than 100 others are being planned in communities across America.[11] NPTN believes local computer networks help citizens to participate in their community by providing them with free access to information and allowing them to communicate with one another.[12]

Free-Nets are designed to connect users to government and social services, encourage local decision-making and community awareness, and create forums for public discussion.[13] Users can send electronic messages the President of the United States[14], debate local tax increases[15], and find information on candidates running for local and state office.[16] Advocates claim that Free-Nets will be as important to democracy in the 21st century as public libraries have been in the 20th century.[17] Some commentators compare Free-Nets to an electronic town square,[18] a metaphor commonly used by those who design Free-Nets.

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[8] Doug Schuler, "Community networks: Building a new participatory medium," Communications of the ACM, 37, Jan. 1994: 38.

[9] Elizabeth Reid, Community computing and the National Public Telecomputing Network. 15 Feb. 1995 [On-line] Available: http://www.nptn.org:80/about.fn/whatis.fn

[10] *Id.*

[11] Personal communication, Elizabeth Reid, NPTN, 14 Feb. 1995.

[12] *Id.*

[13] *Id.*

[14] e-mail address: president@whitehouse.gov

[15] The Ozarks Regional Information On-line Network (ORION) opened up a special forum on its network to discuss a proposed 1/4 cent sales tax increase. [On-line] 8 Feb. 1995

[16] The League of Women Voters in Columbus, Ohio offered information on the Columbus Free-Net about local and state candidates before the 1994 primary and general election. Jim Crowley, "Computer service to post voter information," The Columbus Dispatch 18 Sept. 1994: 2D.

If a Free-Net is to function as an electronic town square, then it needs to provide a public forum where citizens can express themselves freely. Currently, most Free-Nets have restrictions on "inappropriate" speech that may limit freedom of expression. Under the First Amendment, any government restriction on speech in a public forum must be either content-neutral or narrowly tailored to serve a compelling governmental interest.

The restrictions imposed by the Constitution apply only to governmental bodies, not private parties. However, private parties are sometimes considered to be "state actors" because they are so closely connected to the government. In such instances, private parties are subject to the same constitutional restrictions as the government. Whether First Amendment restrictions apply to a Free-Net depends on whether or not it is considered to be a state actor. If a Free-Net is a state actor, any restriction on speech must not violate the First Amendment rights of its users.

The purpose of this article is to examine how the state action doctrine and the public forum doctrine might apply to a Free-Net. Since each Free-Net is a unique entity, a case study will be conducted focusing on one specific Free-Net. Part II of this Article will set forth the basic characteristics of a computer network. Part III will present the Alachua Free-Net ("AFN"). Part IV will discuss the state action doctrine and how that doctrine relates to the free speech rights of users of the AFN. Part V will discuss AFN's specific speech restrictions and how those restrictions comport with traditional First Amendment doctrines.

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[17] Reid.

[18] Gregory Roberts, "Virtual city now a popular reality," The Times-Picayune (New Orleans) 28 Mar. 1994: B1.

II. A brief description of the technology

A. What is a computer network?

A computer network exists when two or more computers are connected to each other, usually via a central computer known as a host.[19] The host stores information and runs the software that allows users to gain access to the information. Users connect to the host computer by using a remote computer, usually with a modem and a telephone line.[20] Most networks allow anyone to access much of the information which is stored on the host computer. A registered user also has a designated file space on his or her host computer to store information and receive messages.

B. What is the Internet?

The Internet is a collection of protocols that allows thousands of computer networks to communicate with each other.[21] Each host computer has an Internet Protocol (IP) address that allows other host computers to connect to it. Not all host computers are directly connected to each other. A host computer in Miami might connect to a host computer in Atlanta in order to reach a host computer in Detroit. Users on one network can connect with thousands of other networks through the Internet.

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[19] Hahn & Stout.

[20] *Id.*

[21] Gilster.

C. What is e-mail?

Electronic mail (e-mail) is a system that allows a network user to send and receive messages and computer files directly from another user. Every network user is allocated a small amount of file space on his or her host computer and given an electronic address that corresponds to that space.[22] Messages received by the host computer are stored in the user's file space, where he or she can retrieve them at any time. A user can almost instantaneously send an e-mail message anywhere in the world as long as a connection exists between the two host computers.[23]

D. What is a discussion group?

A discussion group (also referred to as a newsgroup or a bulletin board[24]) is an electronic forum that allows multiple users to participate. A user can send messages to the discussion group and read messages sent by other users. All of the messages are stored on each participant's host computer. The system operator deletes the messages after a certain period of time to preserve memory capacity.[25] Some discussion groups are moderated, which means that someone reads all the messages sent to the group and decides which messages to post. Most groups are unmoderated, which means that messages are automatically posted.

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[22] This address is actually an extension of the host computer's IP address (Hahn & Stout).

[23] *Id.*

[24] Bulletin board more often refers to a computer network that offers many services, including discussion groups, access to software, etc. *Id.*

[25] How long a message lasts before it is deleted depends on how many messages are sent to the discussion group. A message will only be saved for one or two days if the discussion group is popular. Messages may remain for weeks on a low response group. *Id.*

There are more than six thousand discussion groups available world-wide, with topics ranging from politics to sports to sex.[26] Not every computer network carries all or even most discussion groups. Each network decides which discussion groups it will offer. Users who want to participate in a discussion group not offered by their network must become registered users on a network that does offer that group.

A second type of discussion group is known as a mailing list. Mailing lists use e-mail to send messages to all the users who subscribe to that list. The advantage is that a user can participate in a mailing list even if that user's host computer does not carry that discussion group. A disadvantage is that mailing list messages take up space in the user's file space. Another disadvantage is that while discussion groups are listed in a menu on the network's host computer for easy access, mailing lists are not listed.

E. What is the Internet Relay Chat function?

Internet Relay Chat (IRC) allows real-time messaging between two or more users. This service is very similar to a discussion group except the conversation is live and the messages are not stored for later access.

F. What is an information provider?

An information provider is a group or individual who places information (text, pictures, audio, video, software) in a file for public viewing on a host computer. The information can be stored in a public space on the network host, or in the provider's file space on the host. Users retrieve the information by either knowing the location of the file on the host computer, or by selecting the desired file from a menu on the host computer.

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[26] Each discussion group generally focuses on one topic. Topics can be as narrow as one specific musical group or as broad as politics. *Id.*

III. A profile of one network: Alachua Free-Net

All computer networks with the name "Free-Net" are affiliated with the National Public Telecomputing Network, but each Free-Net has its own unique structure, goals, and services. Prairienet[27] in Champaign-Urbana, Illinois and Seflin Free-Net[28] in Broward County, Florida, are both maintained by a library system while Rio Grande Free-Net[29] in El Paso, Texas, is maintained by a hospital and a community college. This article examines the policies and structure of one specific Free-Net, the Alachua Free-Net (AFN). AFN was chosen because of its proximity to the researchers. After studying 25 other Free-Nets, the authors believe AFN is not an atypical example.

Alachua Free-Net[30] (AFN) serves Alachua County, a county in North Central Florida with 190,000 residents.[31] AFN began operation on September 26, 1994. As of February 1995, AFN had more than 15,000 registered users and 6,000 to 7,000 connections were being made to the network each day.[32]

A. Organizational Structure of Alachua Free-Net

Alachua Free-Net is a 501(c)(3) non-profit organization incorporated in the State of Florida.[33] The National Public Telecomputing Network provides some software and guidance to AFN, but AFN operates under its own Board of Directors. The AFN Board is self-perpetuating; only board members can vote new members onto the board or remove current board members.[34] One current Director is a school board member, and another is the station manager for a local public television station, but these Directors serve AFN in their personal, not official capacities. Unlike some other Free-Nets, the users of AFN are not members and they have no voting rights.[35]

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[27] [On-line] Available: telnet: prarienet.org [login: visitor]

[28] [On-line] Available: telnet: bcfreenet.seflin.lib.fl.us [login: visitor]

[29] [On-line] Available: telnet: rgfn.epcc.edu [login: visitor]

[30] [On-line] Available: telnet: freenet.ufl.edu [login: visitor]

[31] Alachua County Visitors and Convention Bureau (1994).

[32] Personal communication, Bruce Brashear, 3 Feb. 1995.

[33] *Id.*

AFN's computers are housed at the University of Florida, which provides AFN with free access to the Internet[36]. Individuals with home computers can gain access to AFN with a modem. Individuals can also gain access to AFN from computer terminals at the University of Florida, and AFN organizers plans to provide access to AFN from the public library for persons who do not own computers. The public library also provides AFN with office space.

AFN's on-line welcome page states that AFN is sponsored in part by the county and city governments. Support is provided by the local library district, the school board, a community college, the University of Florida, and several local businesses.[37]

B. Alachua Free-Net policies.

As a part of the on-line registration process, users agree to abide by the policies stated in the official AFN policy statement, which is also located on-line. Users do not sign any documents, they merely type "yes" to acknowledge reading the documents on-line. The AFN Board of Directors states on-line that it is the sole arbiter of what content is appropriate for the system.[38] The Board may remove data from any AFN files which it deems inappropriate. Use of AFN is a privilege which can be revoked by the Board at any time for "abusive conduct," including "unlawful, obscene, abusive or otherwise objectionable language." Any commercial or unauthorized use is forbidden. AFN has not issued detailed written policies or criteria as to what constitutes "unacceptable" content. One board member has stated that AFN has avoided detailed policies in order to reduce bureaucracy and increase flexibility as the network grows.[39]

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[34] *Id.*

[35] For details on voting system of Chippewa Valley Free-Net, see Bob Brown, "Information superhighway: Watch for signs ahead," Leader-Telegram (Wisconsin) 4 Mar. 1994: C1.

[36] AFN's Internet address is "freenet.ufl.edu" This address is an extension of the University of Florida's address. The suffix "edu" is given to all Internet addresses associated with educational institutions (Hahn & Stout).

[37] The page says: "Welcome to Alachua Free-Net. Sponsored by: Alachua County Commission; Barr Systems, Inc.; City of Gainesville; Gainesville Sun; IBM Corp.; Southern Bell; Xylogics, Col-Ins-Co., Inc. with multi-year support by: Sun Bank. Nurtured by: Alachua County Computer Users Group; Alachua County Library District; Harbor Development, Inc.; James Moore & Co.; Northeast regional Data Center; Santa Fe Community College; School Board of Alachua County; University of Florida; Watson, Folds, Steadham, Christmann, Brashear, Tovkach & Walker, P.A.; WUFT Public Broadcasting. Alachua Free-Net is an Affiliate of the National Public Telecomputing Network."

AFN is clearly asserting the right to censor the speech of its users. Whether or not this is constitutionally permissible depends on whether AFN is considered to be a state actor. The next section will examine how the state action doctrine might apply to AFN.

IV. When the village square is a private corporation: State action and the First Amendment.

A. The state action prerequisite to the First Amendment.

Under prevailing First Amendment theory, if an owner of land invites persons onto his property to engage in public debate, the owner is generally free to censor speech by expelling those persons she disagrees with.[40] Indeed, the owner may invoke state judicial processes to compel that expulsion under force of law.[41] No First Amendment concerns are raised by such actions because the decision to limit debate is purely private.[42] If AFN is not a state actor, then it is free to place any speech restrictions it wishes on users of its network because the First Amendment only applies to state actors.

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[38] Alachua Free-Net [On-line] Available: telnet: freenet.ufl.edu
[39] Personal communication, Bruce Brashear, 3 Feb. 1995.
[40] *Hudgens*, 424 U.S. 507 (1976).
[41] *Id.*
[42] *Id.*

B. Private actor, governmental setting.

Three general areas of inquiry are relevant in determining whether an ostensibly private party is a state actor: (1) whether the private actor has assumed a traditionally public function; (2) whether there is such a close nexus between the state and the actions of a private party that the particular deprivation being challenged is directly attributable to a decision of the state; and (3) whether there is a symbiotic relationship between the state and the private actor such that the state may be recognized as a joint participant in the challenged activity.[43] Only one of these three areas of inquiry need be satisfied in order to find state action.[44] Often, however, a case will present evidence that fits within more than one of the theories.

1. Public function analysis.

State action exists where a private entity performs a traditionally governmental function. "The relevant question is not simply whether a private group is serving a public function. Rather, the question is whether the function performed has been *traditionally the exclusive prerogative of state*."[45] In such a case, state action is present because the state has decided to vest one of its traditional functions in a private party.

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[43] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).
[44] *Citizens to End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65, 69 (D.Mass. 1990) citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-66 (1978).
[45] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (emphasis in original) (citations omitted).

The archetypal public function case is *Marsh v. Alabama.*[46] A Jehovah's Witness was charged with trespassing after she distributed religious leaflets in the downtown area of Chickasaw, Alabama, which was wholly-owned by the Gulf Shipping Company. The Supreme Court held that the operation of a town with public sidewalks and streets was a traditional public function, and that the State of Alabama could not vest that responsibility in a private party in derogation of the First and Fourteenth Amendments. Similarly, in *Evans v. Newton,*[47] the Supreme Court held that a city park is "municipal in nature," and "traditionally serves the community," and therefore the operation of a privately-owned, racially-segregated city park was subject to the Equal Protection Clause of the Fourteenth Amendment. Finally, in *Smith v. Allwright*[48] and *Terry v. Adams,*[49] the Court held that holding a primary or pre-primary election is a governmental function subject to the constraints of the Fifteenth Amendment, even when the election is conducted by a private political party.

On the other hand, in *Hudgens v. NLRB,*[50] the Court held that a shopping mall is not equivalent to a company town under the reasoning of *Marsh v. Alabama,* and therefore the operator of such a mall is not subject to the strictures of the First Amendment. The Court reasoned that the operation of a shopping center is not a traditional prerogative of the state. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*[51] the Court held that the U.S. Olympic Committee is not a state actor because maintaining such a committee is not the traditional prerogative of the state. Similarly, a nursing home was found not to be a state actor even when it received 90% of its funding from the state and was highly regulated by the state, because operating a nursing home is not a traditional state function.[52]

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[46] 326 U.S. 501 (1946).
[47] *Evans v. Newton,* 382 U.S. 296 (1966).
[48] 321 U.S. 649 (1944).
[49] 345 U.S. 461 (1953).
[50] 424 U.S. 507 (1976).
[51] 483 U.S. 522 (1987).

The public function analysis is narrowly limited to those occasions when a private actor is performing an activity that is exclusively and entirely a state function. The operation of a computer network such as AFN would not be considered "the exclusive prerogative of the state," and so would not be a state actor under the public function analysis. AFN is not the equivalent to the town in *Marsh,* where a private company took over control of the streets, houses, stores, garbage service, police, fire and a host of other municipal functions.

2. Nexus analysis.

Where the state acts as a joint participant in the particular action being challenged, the Court has found that the Fourteenth Amendment applies. In *Lugar v. Edmonson Oil Co.,*[53] for example, the defendant instructed sheriff's deputies to seize plaintiff's property acting under the authority of a court order. The U.S. Supreme Court held that defendant was liable for violating plaintiff's due process rights under the Fourteenth Amendment, because the clerk and the sheriff had acted in concert with defendant.

Similarly, the Court held in *Shelley v. Kraemer*[54] that state judicial enforcement of a racially restrictive covenant between private parties would constitute state action and therefore would violate the Equal Protection Clause of the Fourteenth Amendment. In *Shelley*, a group of private homeowners agreed in writing that none of them would sell their homes to non-whites. One of the homeowners violated the agreement by selling to an African American family. The other homeowners sued to block the African Americans from taking possession of the property. The Supreme Court held that enforcement of the agreement by a state court would be state action and would violate the Fourteenth Amendment.

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[52] *Blum v. Yaretsky,* 457 U.S. 991 (1982).
[53] 457 U.S. 922 (1982).
[54] 334 U.S. 1 (1948).

However, the Supreme Court has held that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state."[55] In *Jackson v. Metropolitan Edison Co.*,[56] for example, the Court held that the decision of a privately-owned electric utility company to turn off a customer's service was not state action subject to the Due Process Clause of the Fourteenth Amendment. The plaintiff in *Jackson* argued that because the state had granted the utility monopoly status and extensively regulated the utility industry, the state had "encouraged" the utility's actions. However, the Court held that the relationship between Consolidated Edison's decision to cancel the customer's service and the state's decision to grant the utility monopoly status was too remote to make the former decision state action. Similarly, the Court has held that the state's licensing of a private establishment to sell alcoholic beverages[57] does not make that establishment a state actor, nor does the state's extensive regulation of a nursing home[58] make that nursing home a state actor.

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[55] *San Francisco Arts & Athletics*, 483 U.S. at 546; *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1981); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).
[56] 419 U.S. 345 (1974).

As these cases indicate, the nexus theory generally applies to a clearly private party that acts in concert with a governmental body in one particular context. AFN does not fit cleanly into this framework precisely because it is *not* clear whether AFN is basically private or basically public.

3. Symbiotic relationship analysis.

If there are extensive contacts between the government and a private party such that each benefits from the other's conduct, then courts have found acts by the private party to constitute state action for purposes of the Fourteenth Amendment. The principal case is *Burton v. Wilmington Parking Authority*,[59] in which a state agency leased space in its parking garage to a privately-operated restaurant that discriminated against African Americans. The evidence showed that the parking garage could not have been financed without the rent income from the restaurant; thus the agency was directly profiting from race discrimination. The Court held that the restaurant's discriminatory policy constituted state action and violated the Equal Protection Clause of the Fourteenth Amendment.

In *Foster v. Ripley*, the United States Court of Appeals for the District of Columbia Circuit held that the Smithsonian Science Information Exchange ("SSIE") was a state actor for purposes of an employee's suit for wrongful termination under the Due Process Clause. SSIE was incorporated as a nonprofit corporation under the laws of the District of

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[57] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).
[58] *Blum v. Yaretsky*, 457 U.S. 991 (1982).
[59] 365 U.S. 715 (1961).

Columbia. Its purpose was to be a clearinghouse for information on developments in medical and scientific research, and to facilitate the planning, management and coordination of such research among federal agencies and private institutions. SSIE generated its operating revenues by means of user fees charged to its clients, which included various government agencies and private institutions. Over 90% of its income derived from federal appropriations or federal contracts. Perhaps most telling to the court was that SSIE was held out to the public as part of the Smithsonian Institution, a government agency. The court held that SSIE had been deeply involved with the government from its inception and had a "pervasive public character," and therefore would be deemed a governmental actor for purposes of the law suit, even though it was ostensibly a private corporation.

In many respects, AFN is similar to SSIE. AFN is largely reliant on public funding, and has been since its inception. In addition, AFN holds itself out as being sponsored in part by Alachua County and the City of Gainesville, and serves several well-defined and clearly-articulated public purposes. By encouraging all individuals to participate in local discussion groups, one could argue that AFN also has a "pervasive public character." Indeed, the only major difference between AFN and SSIE is that a majority of the seats on SSIE's Board of Directors are held by the Smithsonian Institution, a government agency; whereas AFN has no ex officio seats on its Board.[60]

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[60] A private Board of Directors is not necessarily preferred from a First Amendment perspective, however. A director who serves *ex officio* is at least indirectly accountable through the political process, while a self-perpetuating private Board of Directors is almost completely unaccountable.

C. A "Spectacular" case: The Supreme Court ducks an opportunity to clarify the state action doctrine?

Supreme Court decisions addressing the state action question to date have focused on the relationship between the state and the private actor: Has the state allowed a private party to usurp a traditionally public function? Has the state entered into a symbiotic relationship with a private actor? Has the state acted in concert with a private actor or regulated a private actor to such a degree that the actions of the private actor can fairly be attributed to the state?

However, many lower courts now interpret Supreme Court state action precedents with an eye toward the substantive claims asserted by the plaintiffs.[61] A hierarchy of state action standards has developed so that each substantive constitutional claim -- race discrimination, gender discrimination, free speech, due process -- requires a different degree of strictness in its state action test.[62] As Judge Friendly stated the theory in *Wabba v. New York University*, "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees."[63] Justices Marshall and Brennan in separate dissents have approved of a similar differential state action analysis based on the competing substantive interests of the parties.[64] Generally, courts have required a minimal showing of state action for equal protection claims of race discrimination; a slightly higher showing for sex discrimination claims; and an even higher showing for First Amendment claims. State action cases which allege a violation of procedural due process, such as where an employee objects to being terminated without a pre-deprivation hearing, require the strictest showing of state action.

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[61] See generally, Jody Young Jakosa, "Parsing Public from Private: The Failure of Differential State Action Analysis," 19 Harv. C.R.-C.L. L. Rev. 193 (1984) (citing cases, pp. 195-199, n. 8-11).

[62] *Id.*

[63] 492 F.2d 96, 100 (2d Cir. 1974).

[64] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Brennan, J., dissenting).

Whether it is appropriate for a court to rank constitutional rights in this way was one question before the United States Supreme Court in the recent case of *Lebron v. Nat'l Railroad Passenger Corp.(Amtrak).*[65] In *Lebron,* an artist named Michael Lebron contracted with Amtrak to display one of his works on a large billboard known as "the Spectacular," which is located in New York's Pennsylvania Station. However, Amtrak later refused to display the advertisement on the grounds that it was "political."[66] Lebron sued Amtrak in the United States District Court for the Southern District of New York,[67] alleging that Amtrak's censorship violated his free speech rights under the First Amendment. Amtrak argued that it was a private entity and therefore not subject to the requirements of the First Amendment, and moreover that as a private corporation Amtrak had a First Amendment right to control speech on its billboards in whatever fashion it chose.

The trial court concluded that, "based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operations," Amtrak's censorship of billboards was state action.[68] While the court noted that Amtrak is a business corporation and that Congress has stated that Amtrak is not "an agency, instrumentality, authority, or entity, or establishment of the United States Government,"[69] the court also noted that Amtrak was created by Congress;[70] is a public entity under the Americans with Disabilities Act;[71] has a board of directors appointed by the President of the United States; has its operating losses financed each year by an appropriation from Congress;[72] and acquired Pennsylvania Station through statutory condemnation paid for by the federal government.

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[65] 811 F.Supp. 993 (S.D. N.Y 1993), reversed 12 F.3d 2423 (2d Cir. 1993), remanded 115 S. Ct. 961 (1995).

[66] The proposed billboard satirized a Coors beer advertisement by depicting Nicaraguan peasants being menaced by flying beer cans. The display also contained some written commentary criticizing the Coors family for its support of Nicaraguan contras and other right-wing causes.

[67] *Lebron v. National Railroad Passenger Corp. (AMTRAK),* 811 F.Supp. 993 (S.D.N.Y. 1993).

[68] *Id.*

Amtrak cited a number of cases in which discharged employees had sued Amtrak or Conrail for procedural due process violations. In every case, the courts had held that Amtrak or Conrail's actions in dealing with their employees were not governmental action.[73] Amtrak's argument was that these cases demonstrated that it was not a governmental actor in the instant case, but the district court rejected that argument, stating:

> The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue. As Judge Friendly explained in *Wabba v. New York University*,[74] "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims

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[69] 45 U.S.C. § 541.
[70] 45 U.S.C. § 501.
[71] 42 U.S.C. § 12131 (1) (C).
[72] The court noted that since the federal government finances Amtrak's losses each year, every dollar of Amtrak's revenue from leasing advertising space results in a one dollar reduction of the subsidy the federal government is obligated to pay. This suggests a symbiotic relationship similar to *Burton*, supra, note 16.
[73] *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Andrews v. Consolidate Rail Corp.*, 831 F.2d 678 (7th Cir. 1987); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720 (7th Cir. 1987); *Marcucci v. National R.R. Passenger Corp.*, 589 F.Supp 725 (N.D.Ill. 1984); *Railway Labor Executives Ass'n v. National R.R. Passenger Corp.*, 691 F.Supp. 1516, 1524 n.11 (D.D.C. 1988).
[74] 492 F.2d 96, 100 (2d. Cir. 1974).

> concerning different forms of government involvement and other constitutional guarantees." Indeed Amtrak conceded at oral argument that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect.[75]

The district court concluded that the regulation of public speech on billboards in a public train station raised very different considerations from Amtrak's administration of its workforce. While the court found no important policies of the Constitution that would be undermined by permitting an employer that is entwined with the government to deal with employees under the rules that govern private employers, to allow the same entity "to regulate, control, or censor speech in the same manner that is permitted for a private actor risks to do important damage to one of the most important principles in the Bill of Rights."[76] The court found that the government's ability to impose content-based burdens of speech raises the specter that the government may drive certain idea or viewpoints from the marketplace of ideas,[77] and this danger was of more import than any constitutional concerns that might arise regarding Amtrak's employment decisions. Thus, holding that government action was present, the court turned to the question of whether this governmental action violated the First Amendment, which the court held it did.[78] The Court of Appeals for the Second Circuit reversed the District Court, stating that for First Amendment analysis, there was no state action present.[79] The case was appealed to the U.S. Supreme Court, which issued its ruling in February 1995.

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[75] *Lebron,* 811 F.Supp. at 999 (citations deleted).

[76] *Id.* at 1000.

[77] *Id.* at 1000 (quoting *Simon & Schuster v. Members of New York State Crime Victims*, ___ U.S. ___, 112 S.Ct. 501, 508 (1991)).

[78] *Id.*

[79] 12 F.3d 388 (2d Cir. 1993).

The Supreme Court could have chosen in *Lebron* to set out a new standard for First Amendment symbiotic relationship cases. Instead the Court held on an entirely different issue. The Court simply found that Amtrak *was* the government, obviating the need for any symbiotic relationship, public function or nexus analysis.[80] Thus, under facts strongly indicative of state action, Justice Scalia, writing for himself and 7 other members of the Court, found a way to avoid setting any state action precedent at all.

D. Is Alachua Free-Net a state actor? -- Applying a case-specific approach.

Whether Alachua Free-Net would be considered a state actor depends primarily on the symbiotic relationship between AFN and the government. One factor suggesting entanglement with the state is government funding. AFN's initial funding sources, for example, were two grants of $25,000 each -- one grant from the Alachua County government and one grant from the City of Gainesville government. However, funding by itself is not sufficient to establish state action.[81]

Clearly, AFN has benefited from the infusion of a $50,000 municipal investment, and the City and County governments believe that the community will benefit from AFN generally.[82] The symbiotic relationship here goes deeper, however. The County Commission that approved the $25,000 payment to AFN reallocated money out of the budget for a then-nascent county operated computer network that would have provided public access to county records.[83] Thus, the County gave AFN funds in part to satisfy long-term governmental need to comply with open government records laws.

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[80] Lebron had actually conceded in oral arguments before the district court that Amtrak was *not* part of the government.

[81] *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school that received most of its funding from the state was not a state actor for purposes of a due process action by a discharged employee).

[82] Hearing before Alachua Board of County Commissioners, April 26, 1994.

Moreover, one of the founding directors of AFN is an Alachua County School Board member, and promoted AFN before a meeting of the County Commission.[84] She stressed the value AFN would have to local public schools. Other AFN board members are a public library official and the director of the local public television station.[85] In addition, AFN's no-cost Internet link and computers are housed physically at the University of Florida, a public university, and AFN's offices are located (rent-free) at the Alachua County Public Library, which is owned by the County. While none of these factors is the "nail in the coffin," together they point to an organization that sees itself as something more than a private corporation.

In conclusion, whether AFN will be considered a state actor by a court will depend on the factual posture of the particular litigation and the nature of the right being asserted. Assuming that the First Amendment does apply, or at least *should* apply to such an organization, however, it is necessary to evaluate the specific First Amendment concerns that would arise based on a finding of state action.

V. Applying First Amendment law to the Alachua Free-Net.

A. A brief primer in public forum law: If you are a state actor and you open your forum to the public, you lose the right to control content.

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[83] *Id.*

[84] *Id.*

[85] All board members appear to be acting in their personal capacity, not *ex officio* to a government position.

1. Introduction to the public forum doctrine.

In *Perry Education Association v. Perry Local Educator's Association,*[86] the Supreme Court expressly adopted a forum analysis to determine whether a particular limitation on speech violates the First Amendment. Three types of government fora may apply to a particular case. The first type is the traditional public forum, which includes only those places which have "immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[87] Any regulation of speech in a public forum must either meet the strictest test of scrutiny, or be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Some commentators have suggested that a computer network, having been created solely for the purpose of many-to-many communications, could be such a quintessential public forum.[88] However, in *International Society for Krishna Consciousness, Inc. v. Lee,*[89] the Court suggested that no recently-created fora (an airport terminal in that case) could ever meet the strict "long tradition, time immemorial" standard. AFN would probably not fit within the traditional public forum category, despite its distinct public forum purposes, because it is not traditional. Furthermore, although AFN and other Free-Nets have been very popular, it remains to be seen whether they will become so integral to their communities so as to become the equivalent to the streets, parks and public sidewalks that currently are the true public fora.

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[86] 460 U.S. 37 (1983).

[87] *Id.* at 43.

[88] Edward V. Di Lello, "Functional Equivalency and its Application to Freedom of Speech on Computer Bulletin Boards," 26 Colum. J. L. & Soc. Probs. 199 (1993).

[89] ___ U.S. ___, 112 S.Ct. 2701 (1992).

The second class of government fora consists of "public property which the state has opened for use by the public as a place for expressive activity."[90] The government can close such a forum if it wants to, but so long as it keeps the forum open, it is bound to the same requirements that apply to traditional public fora.[91] If AFN is a state actor, many of its services would fall within this category of public fora.

Finally, the third class of fora are non-public. "The state, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."[92] The state may ban or regulate speech in a non-public forum in order to reserve the forum for its intended purpose, communicative or otherwise, so long as the regulation is reasonable (the lowest level of scrutiny) and not content-based.[93]

Given this general framework, the four types of fora found on the AFN system must be analyzed separately to determine the constitutional standard AFN should be held to in regulating the speech of users and allocating space for discussion groups.

2. E-mail: A private space.

The e-mail service AFN provides is not a public forum in the ordinary sense of the term, because instead of being stored on public files in the host computer, a user's e-mail is stored in his or her private file on the host computer. AFN's on-line menu states that

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[90] *Id.* at 46.

[91] *Id.*

[92] *Id.*

[93] *Id.*

AFN reserves the right to examine and delete "offensive" e-mail messages upon registration of complaint. Every registered AFN user is given a personal e-mail address where he or she can receive e-mail. Registered users can also use AFN to send e-mail to any address on the Internet, including the addresses of other AFN users. In addition, users can join discussion groups operated by persons on the Internet which automatically send any message from one member of the group to every other member's e-mail address. While users certainly use e-mail for protected First Amendment expression, it is not a place that is open to the public. Therefore for First Amendment purposes, the e-mail service and the memory space that is provided for it should not be analyzed as a forum but as a due process entitlement, which cannot be revoked pursuant to regulations which themselves violate the First and Fourteenth Amendments.[94]

3. Some clearly public spaces.

AFN's Internet Relay Chat is clearly a designated public forum. Participants can exchange messages in real-time on any topic of their choosing. Speech in this forum should be given the full protections of the First Amendment. No content-based restrictions should apply unless the restrictions are narrowly tailored to serve a compelling government interest.

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[94] In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Court held that an untenured university professor was entitled to a pre-deprivation hearing to determine whether he was being fired for exercising First Amendment rights. The Court's reasoning was that the university could not rely on an unconstitutional condition in revoking a vested entitlement to employment. Similarly, for AFN to revoke a person's privilege to use e-mail pursuant to a content-based speech restriction would violate the First Amendment. The e-mail privilege is a due process entitlement because AFN states in its User Agreement that use of the network is "a privilege which may be revoked by the administrators of system at any time for abusive conduct." This language makes it implicit that unless some sort of abusive conduct takes place, the privilege will not be revoked. If AFN stated that privilege could be revoked at any time for any reason, then it would be easier to come to the conclusion that no property right inures to AFN users. See *Bishop v. Wood*, 426 U.S. 341 (1976) (in granting a benefit, government is free to define benefit in such a way that no property interest arises). Note that AFN states in the Agreement that AFN will be the "sole arbiter" of what is abusive. However, this disclaimer does not describe the extent of the property interest, but rather purports to limit the process due, which is a constitutional question, not a contractual one. The disclaimer would not be binding in court.

AFN's discussion groups are also public fora. AFN established these groups to foster expression among users. AFN currently offers 17 local discussion groups[95] and 545 national discussion groups for its users. Users can suggest new local or national groups, but AFN states on-line that it will not carry any group that might contain material inappropriate for children. AFN also states it will remove any message that it deems "objectionable."

Because the discussion groups are operated for a limited purpose as described in the title of each group, speech in those fora is presumably intended to be limited to the purpose of the forum. Does this change the First Amendment analysis? It could be argued, for example, that the "hobbies" discussion group is designed for hobbyists to discuss hobbies and has not been opened for general use as a public forum.

In *Kriemer v. Bureau of Police,* the Third Circuit stated that a public library was only a limited public forum, and hence was obligated only to permit the public to exercise rights consistent with the nature of the library. The Second Circuit has stated that a limited public forum is created when the government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.[96] However, unlike discussion groups on computer networks, the places that have been designated limited public fora by the courts have not been places designed solely for speech.[97] Discussion groups are open publicly for any user to speak; the only distinctions among them are based on content of expression. Thus, while a library could limit speech that interfered with the quiet and orderly nature of the library, it is not at all clear that library could limit speech only to gardening. The names of the discussion groups are perhaps best seen as suggested topics, not hard and fast rules for what subjects may be discussed in a particular discussion group. AFN has not yet issued a policy on this question, although there is a procedure for users to complain to AFN when users are disruptive or abusive.

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[95] Six of the groups deal with computers, three offer classified ads, four talk about politics, and four are about Alachua Free-Net.

[96] *Travis v. Owego-Apalachin School District,* 927 F.2d 688, 692 (2d Cir. 1991).

4. AFN's information database: Private pulpits in a public space.

AFN provides one forum that is not offered to every registered user -- a place in AFN's information database. The database is designed to allow government agencies, hospitals, service organizations, special interest groups, clubs, and businesses to communicate information about their services to the public. Each information provider is given its own memory space and menu on the host computer. Any registered AFN user can then access this information through a menu system organized by subject.

To become an information provider, either a group or an individual representing a group must apply for an "organizational account." Who is eligible for such an account? This is not clear.[98] In one menu, users are told that anyone can provide public information and that businesses can provide information about their services. However, in a separate menu titled, "Policy for information providers," users are told that businesses can only provide general information about a topic. A business cannot mention brand names or endorse the use of any specific product or service. A business that provides an information menu can put its name and electronic mail address at the bottom of the screen, but "no advertising is permitted."

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[97] *Adderley v. Florida*, 385 U.S. 39 (1966) (jails built for security and not open to public); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (advertising space on city mass transit vehicles part of commercial venture not a public forum); *Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (U.S. Postal Service mailboxes designed for safe and effective delivery of mail and not as public fora).

[98] The On-line information provider policy states, "If you would like to provide educational information about an organization, agency, club, business, or group in the local area, the following guidelines and information may be helpful. 1. Who can provide information? Government agencies, service organizations, associations, special interest groups and clubs, schools, civic organizations, churches, medical service providers such as hospitals and clinics, consultants and other businesses with information

Assuming AFN is a state actor, the First Amendment requires that if AFN opens this forum for one organization, it may not later decide to deny another group's application because of the group's beliefs. In *Widmar v. Vincent,*[99] a religious group at the University of Missouri sought to use university facilities to conduct its meetings. The University denied the request on the ground that the University was prohibited from using its buildings for religious worship or religious teaching. The Supreme Court held that the University could not prohibit a religious group from using the facilities when it permitted non-religious groups to use them. The Court stated that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place."[100]

In *Concerned Women for America, Inc. v. Lafayette County,*[101] the Fifth Circuit very nearly addressed the question of whether AFN would have the ability to deny space on the information database to a particular group based on the content of their expression.

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about their services. Generally *anyone* who provides public information free of charge is eligible [emphasis added].

[99] 454 U.S. 263 (1981).

[100] *Id.* at 267-68.

[101] 833 F.2d 32 (5th Cir. 1989).

The case involved a policy of Lafayette County Oxford Library that stated that its auditorium was: "[O]pen for use of groups or organizations of a civic, regional, cultural or educational character," but not for, among other things, religious or political purposes.[102] The Concerned Women for America requested to use the auditorium for a prayer meeting. The library refused her request because CWA was a group with religious purposes. In the past, the U.S. Navy, the United Way, the American Legion, Adult Program on AIDS, the Oxford Swim Club and several other groups, had used the auditorium. The Fifth Circuit rejected the content-based distinctions in the library's policy on the basis that they could not withstand strict scrutiny, and upheld the lower court's injunction ordering the library to allow Concerned Women for America to hold its meeting in the auditorium. Together, the *Widmar* and *Concerned Women for America* cases indicate that AFN may not make content-based distinctions among parties who seek to obtain space in the information database.

B. Is there any excuse for the commercial speech taboo?

The foregoing discussion demonstrates that if the Aryan Knights of the Ku Klux Klan wished to be included in AFN's database, then AFN as a state actor would have to include them. But what if Wal-Mart wants to have a page on AFN's database highlighting its special sale items each week? AFN and most other Free-Nets reject all advertisements.[103] Given recent decisions regarding First Amendment protection for commercial speech, can a state actor support such a restriction?

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[102] *Id.* at 33.

[103] Christina Brinkley, "As Florida's Computer Networks Spread, Businesses Seek to Log On," Wall St. Journal, 15 Feb. 1995.

In *City of Cincinnati v. Discovery Network, Inc.*, the City of Cincinnati, seeking to improve the safety and appearance of its sidewalks, revoked permits for 38 freestanding newsracks that had been used to distribute magazines containing advertisements for adult-education courses offered by the Discovery Network; and revoked the permits for 24 newsracks that had been used to distribute free magazines containing real estate advertisements. The City claimed that its decision was authorized under a City ordinance which prohibited the distribution of "commercial handbills" on public property. The 1,500 to 2,000 newsracks in the City that carried traditional newspapers were not effected by the City's action.

The Supreme Court applied the test from *Central Hudson Gas v. Public Service Commission*[104]. The first question was whether the commercial speech was unlawful or misleading. The Court found no allegations that the advertising here was unlawful or misleading. That being the case, the burden was on the City to establish a substantial government interest that was directly advanced by a regulation no more extensive than is necessary to achieve the City's objective.

Applying this standard to the evidence, the Court found that the City had legitimate and substantial interest in safety and aesthetics, but also found "ample support in the record for the conclusion that the city did not establish the reasonable fit we require."[105] The City could have addressed its concerns about newsracks by regulating their size, shape, appearance, or number, but it considered none of these options, which indicated that the City had not carefully calculated the costs and benefits associated with the ban. Moreover, the Court found that the benefit from the removing 62 newsracks while leaving 1,500 to 2,000 in place was "paltry."[106]

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[104] 447 U.S. 557 (1980).

[105] *Id.* at 1510 (citations and quotations omitted).

Applying the *Discovery Network* analysis to AFN's ban, it is clear that AFN may ban commercial speech if it is unlawful or misleading. However, when it bans commercial speech altogether, AFN must assert a substantial state interest. One justification is that "commercialization threatens AFN's community aura and may drive away the volunteers who keep costs low."[107] Another substantial interest is that businesses would overload AFN's computer space and general resources with far higher demand for entry and storage of information than the current civic/education-only format creates.

It is debatable whether allowing commercial speech on Free-Nets would create these problems. First, supporting local economies has been a major justification for promoting free-nets in many communities.[108] This was one of the justifications the Alachua County Commission relied on in granting funding to AFN.[109] Commercial information on AFN would likely make the service *more* useful to people in the community, not less useful. Customers, especially poor ones, have a compelling interest in determining which vendors have the lowest prices for products, for example.[110] Thus, it is not clear at all that volunteers would lose interest in promoting AFN if commercial speech were permitted.

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[106] *Id.* (quoting lower court).

[107] Brinkley.

[108] *Id.*

[109] Hearing before Alachua County Board of Commissioners, April 26, 1994.

[110] *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

Second, there is no reason to assume that an avalanche of commercial information would flood AFN if it allowed overt commercial speech, because businesses are already allowed to establish organizational accounts on AFN, and so far AFN has not been flooded with businesses vying for space. Furthermore, AFN could limit the amount of total space on the information service or limit the number of information providers, offering space on a first come, first serve basis.[111] This would be a closer fit with the goal of preserving memory space.

C. Can AFN limit discussion on discussion groups to protect the most sensitive listeners?

Discussion groups are a rich source of information and an exceptional opportunity for ordinary citizens to communicate with others who share similar concerns. For example, an AFN user in Gainesville, Florida who is interested in the Edmonton Oilers hockey team can communicate with Internet users around the world who have similar interests. This is because one of the 545 discussion groups available through AFN is devoted to discussing the Edmonton Oilers. Similarly, AFN users who are interested in home-town politics can discuss such matters on the "local politics" discussion group located on AFN's main menu.

But what about single adults in Gainesville who would like to discuss romance with other Gainesville singles? Does AFN have to give them a discussion group? What about a Nazi revisionist who wants AFN to make a discussion group called

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[111] See, e.g., *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*, 797 F.2d 552 (8th Cir. 1986) (Policy of selling advertising space on scoreboard in municipally owned sports complex under exclusive, ten-year contracts on first-come, first-served basis was reasonable method of promoting revenue and was content neutral).

"alt.discuss.nazi" available to Gainesville residents? Because AFN's memory capacity is limited, it can only offer a limited number of discussion groups. Assuming that AFN is a state actor, does the First Amendment govern the allocation of this resource, or is this a question properly left to AFN's discretion?

First, it has to be recognized that AFN does not have the memory space required to provide access to all 6,000 discussion groups available worldwide, nor does it have the space to create a local discussion group for every person who would like to have one. If the asserted right is that of a speaker to speak to a discussion group currently not offered on AFN, then the easiest reply is that the state (AFN) has no affirmative duty to supply such a forum. To gain judicial relief, the speaker would have to show that AFN is discriminating against the discussion group he wants based on content, thus violating the First Amendment. Such discrimination will be a difficult matter to prove. Thus, the plaintiff speaker will be forced to attack the constitutionality of the *process* AFN uses to select discussion groups, rather than the selections themselves.

1. Vagueness.

Right now, AFN invites suggestions for new discussion groups, but provides no written policy on how selections are made, except to say that it will not carry discussion groups which include material not suitable for children. When an official has such unbridled discretion over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for and being denied a license.[112] Thus, assuming AFN were a state actor, any AFN user could bring suit to attack the method by which AFN selects its discussion groups. This is because decisions as to which discussion groups will be carried by AFN are essentially ad hoc subjective determinations.

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[112] *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

In *City of Lakewood v. Plain Dealer Publishing Co.*[113] the Supreme Court invalidated an ordinance granting the Mayor of Lakewood discretion to grant or deny applications for annual permits to place newsracks on public property. The Court held that the City could require licenses for newsracks only if the City established neutral criteria to insure that the licensing was not based on the content or the viewpoint of the speech being considered. Similarly, in *One World Family Now v. City of Key West*,[114] a federal district court invalidated a policy of the City of Key West, Florida that required persons to obtain a permit before they could set-up portable tables on city sidewalks to distribute literature and T-shirts. The court noted that "[n]one of the ordinances cited by the Defendants provide specific regulations regarding the permit/license application processes. Nor do they provide criteria to guide city officials in determining whether to grant or deny a permit application."[115]

AFN should institute a policy with official guidelines for the selection of discussion groups. By definition, these decisions must be at least partly content-based, just as the decision by a public library to purchase one book over another is always a content-based decision to some degree. To make these decisions judicially reviewable and justifiable, however, AFN must follow written objective criteria. Possible criteria could be the number of user requests for the discussion group; the degree of overlap or redundancy with other discussion groups; the volume of data and discussion available in the discussion group; and any comments and complaints from users on the usefulness of the discussion group. AFN should make these criteria publicly known, so that users know how and by whom the decision to carry or not carry a discussion group is made.

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[113] *Id.*
[114] 852 F.Supp. 1005 (S.D. Fla. 1994).
[115] *Id.* at 1010.

The scarce nature of discussion group memory space means that so long as AFN's decision-making process is transparent and viewpoint-neutral, it would simply not be reasonable for a court to order AFN to carry one particular discussion group over another. This is a question best left to AFN's discretion as an expert. However, AFN needs to be able to show that its decisions are not arbitrary or viewpoint-based, and it cannot do so without establishing an official decision-making process. Unbridled discretion creates a presumption of unconstitutionality.

2. Overbreadth.

The only criterion AFN does provide for the selection of discussion groups is that all discussion groups must be "suitable for children." This is an overbroad content-based criterion used to solve a problem which could be addressed by less restrictive means. Assuming that AFN is a state actor, the "suitable for children" standard would not survive judicial review.[116] It does not require a great exercise of imagination to see such a standard used to preclude discussion of the great literary works which some persons might view as unsuitable for children.

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[116] See, e.g., *Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) (Overbreadth doctrine applied because there was no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits); *Houston v. Hill*, 482 U.S. 451 (1987) (City ordinance that made it a crime to "interrupt any policeman in the execution of his duty" overbroad because it gave police "unfettered discretion to arrest individuals for words or conduct that annoy or offend them").

Courts have held on numerous occasions that even speech that is unsuitable for children is protected by the First Amendment.[117] While there is a compelling interest in protecting children from indecent speech, the government must choose "the least restrictive means to further that articulated interest."[118] *Sable Communications v FCC* involved an FCC regulation which banned the transmission of indecent speech over telephone wires. The Supreme Court ruled the government had a compelling interest in protecting children from indecent speech, but that the regulation was not narrowly tailored to serve that purpose. The Court differentiated *Sable* from cases involving broadcasting because broadcasting is a uniquely pervasive medium and viewers may turn to a television channel and see indecent speech without any warning. Dial-a-porn services, on the other hand, require the active participation of the listener.

AFN would probably fall somewhere in between the telephone and the television cases. Like dial-a-porn, AFN users must take affirmative steps to access information which may be indecent. Usually such information is accessed through a menu that indicates the nature of the material. Thus the *Sable* ruling might apply to AFN and other Free-Nets.

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[117] *Sable Communications v FCC*, 492 U.S. 115 (1989), *Action for Children's Television v. FCC* 852 F.2d 1332 D.C. Cir. 1988 (ACT I), *Action for Children's Television v. FCC* 932 F.2d 1594 D.C. Cir. 1991 *Rehearing En Banc denied (ACT II)*, *Action for Children's Television v FCC* 11 F.3d 170 vacated, for Rehearing En Banc, 1994 (ACT III).

[118] *Sable Communications v FCC*, 492 U.S. 115, 126 (1989).

But like television, AFN is free, and its users may browse through menus in much the same way that television viewers browse through channels. The *Action for Children's Television* cases involved indecent material on television. The District Court ruled that even though television is a pervasive medium where viewers may stumble upon indecent programming without warning, an outright ban on indecent speech by the FCC would be unconstitutional. Instead the FCC can restrict indecent speech to certain time periods when children would be less likely to be in the viewing audience.

Assuming that AFN is a state actor, courts would likely rule that a ban of all speech deemed "unsuitable for children" is unjustifiably overbroad.[119] Other less restrictive methods are available to prevent children from viewing indecent material without burdening speech which is not aimed at children. For example, AFN could provide special software to put most potentially offensive discussion groups and information sections beyond the reach of children. This would protect children without the trammeling the rights of adults to engage in constitutionally protected speech.

Conclusion

A growing number of communities nationwide are establishing Free-Nets. Alachua Free-Net is typical of these computer networks. AFN imposes content-based speech restrictions which would not be permitted in a traditional public forum. However, under the state action doctrine, the First Amendment rights that protect speech in traditional public fora only apply to state actors. An examination of AFN provides support for the conclusion that it is a state actor. The University of Florida provides AFN with its Internet connection and houses AFN's host computer; local government provides AFN with financial support and on-line access to public records; and the public library gives AFN free office space. At the same time, AFN provides Alachua County with public fora for its citizens; public access to government documents; and a powerful tool for economic development. This evidence of a symbiotic relationship between AFN and local government justifies a conclusion that AFN is a state actor.

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[119] AFN is not the only civic network to ban speech unsuitable for children. For example, the Big Sky Telegraph network in Billings, Montana and the Rio Grande Free-Net in El Paso, Texas also specifically ban speech unsuitable for children. Almost every civic network claims the right to remove material that is subjectively deemed "objectionable."

As a state actor, AFN provides services which should be considered public fora. AFN's arbitrary restrictions on "offensive or otherwise objectionable" speech are too vague and broad to be constitutional for public fora. These content-based restrictions violate the First Amendment. Content-based restrictions on other Free-Nets may also violate the First Amendment.

As the number of Free-Nets continues to grow, more and more citizens will use Free-Nets to disseminate ideas and discuss issues of public concern. These networks represent great promise for grass-roots political and civic participation. Hopefully, they will thrive as a place where people can communicate as citizens in a public forum, rather than merely as consumers on commercial networks. To achieve these goals, Free-Nets should develop clear rules and transparent management structures to ensure that they continue on their current course of offering an effective communications tool for the entire community. Moreover, whether state actors or not, Free-Nets should commit themselves to providing full First Amendment freedoms to their users. If the only speech permitted is that which no one would find objectionable, the public utility and democratizing potential of the medium will be severely limited.

The Internet and the commercial on-line services are all geared toward a national marketplace. Free-Nets have the unique potential to create local fora to serve individual communities. Just as local newspapers and broadcast outlets are an important part of communities today, local computer networks will be an important part of communities in the future. As public discussion moves from the town square and traditional mass media to computer networks, Free-Nets should provide public fora where freedom of expression is protected.

Speakers' Rights in Private Forums:
how the First Amendment might look on the information superhighway

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Presented to the law division of the Association for Education in Journalism and Mass Communication at the AEJMC annual convention in Washington, D.C., on August 11, 1995.

Speakers' Rights in Private Forums:

how the First Amendment might look on the information superhighway

In *Political Freedom*, his landmark treatise on freedom of speech, Alexander Meiklejohn uses the New England town meeting to illustrate the ideal form of political communication. Speakers are recognized in an orderly fashion and allowed to contribute their ideas to the discussion. Speakers are required to address the issue at hand and are discouraged from repeating what others have said. All participants are treated equally.

For Meiklejohn, freedom of speech exists to foster the political process. Speech is primarily a means of education, not personal expression. He says:

> "The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to do so. If, for example, at a town meeting, twenty like-minded citizens have become a "party," and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion. What is essential is not that everyone shall speak, but that everything worth saying shall be said."[1]

Meiklejohn's ideas about the citizen's role in government and the educational value of speech have influenced several generations of political theorists. U.S. Supreme Court Justice William Brennan incorporated Meiklejohn's ideas into the court's famous *New York Times v. Sullivan* decision, noting that citizens have not only a right but a duty to criticize their government officials.[2]

In subsequent decisions, the court broadened the categories of speech which received strong First Amendment protection, finding that some commercial speech also contributes to citizens' ability to function in a free-market democracy.[3] In fact, courts during the past few decades have been reluctant to rule that any category of speech, including explicitly sexual material, is completely without value.[4] Thus, judicial rulings have gradually led Americans to believe that the First Amendment should not only protect everything worth saying but everyone who has something to say.

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[1] Alexander Meiklejohn, *Political Freedom: the constitutional powers of the people*, (New York: Harper & Brothers, Publishers, 1960), p. 26.

[2] 376 U.S. 254 (1964), at 282. See also, Harry Kalven Jr., *The New York Times Case: A Note On "The Central Meaning of The First Amendment,"* Supreme Court Review 191 (1964).

At the same time, however, it has become apparent that not everyone who has something to say has a forum in which to say it. Town meetings are infrequently held and sparsely attended. Most people get their information from the mass media, and the high cost of starting new newspapers and cable television operations, combined with the licensing of broadcast stations, limits those venues.[5]

In the past few years, the Internet and commercial computer services have emerged as an alternative to the mass media for people who want to share their personal, political and social views with others. Computerized bulletin boards, on which computer users can leave messages to be read by others who use the same network, have proliferated. Bulletin boards dedicated to topics ranging from constitutional law to Kool-Aid receive hundreds — even thousands — of messages. Prodigy's arts bulletin board, which may be the largest, receives more than 20,000 messages each day.[6]

Some have heralded the network of computers, often referred to as cyberspace or the information superhighway, as a forum for the exchange of political information.[7] New England-style town meetings need no longer take place in New England. But access to the bulletin boards — and other electronic communication, such as electronic mail — varies depending on how one connects to the network. Access points are provided by educational and research institutions, community organizations and private companies. While most of the information superhighway's 20 million users connect through business, community and government services, nearly five million subscribe to private services, such as Prodigy, CompuServe and America Online.[8]

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[3] *Bigelow v. Virginia*, 421 U.S. 809 (1975); and *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748 (1976).

[4] *Pope v. Illinois*, 107 S.Ct. 1918 (1987). Also, *Penthouse v. McAuliffe*, 610 F.2d 1353 (1981).

[5] Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, Duke Law Journal 1, 38 (February 1984).

[6] William Grimes, "Computer as a Cultural Tool: Chatter Mounts on Every Topic," *New York Times*, 1 December 1992, sec. C, p. 13.

[7] Roger Karraker, "D.C. embraces 'electronic democracy:' White House, Congress use e-mail for citizen feedback," *MacWeek*, 21 June 1993, 10; Ellis Booker and Mitch Betts, "Democracy goes on-line," *Computerworld*, 31 October 1994, 1; Also, Marianne Taylor, "Users say computer network is muzzling their give-and-take," *Chicago Tribune*, 7 January 1991, Business section, p. 1.

All access providers exercise some control over what information is available to their users.[9] For example, several Canadian universities have blocked access to bulletin boards that discuss unusual sex acts, and California's Santa Rosa Junior College suspended a professor after some students posted offensive messages on bulletin boards he started.[10]

However, the private online services have shown a greater inclination than public institutions to control users' postings. Last year, America Online shut down several of its feminist forums that had the word "girl" in their titles. An America Online spokeswoman said the company was concerned that young girls would mistakenly think the forums were for them.[11]

Prodigy has received complaints about its censorship practices for years. In late 1990, the company revoked some subscribers' access privileges after they organized a protest of its rates.[12] The dispute started when Prodigy announced a rate increase for electronic mail which would largely impact the system's heaviest users. Some Prodigy users posted notices on its bulletin boards, urging others to protest the rate increase by boycotting companies that advertise on the Prodigy network. When Prodigy deleted the bulletin board messages, the users resorted to a chain letter delivered via electronic mail. Prodigy then revoked the access privileges of about a dozen leaders of the protest.

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[8] Peter H. Lewis, "America Online says users of service exceed 1 million," *New York Times*, 17 August 1994, sec. D, p. 4(L); Amy Harmon, "At 25, Internet readies move into free market," *Los Angeles Times*, 5 September 1994, sec. A, p. 1(H).

[9] Taylor, "Users say computer network is muzzling their give-and-take," 4.

[10] William M. Bulkeley, "Censorship Fights Heat Up on Academic Networks," *Wall Street Journal*, 24 May 1993, sec. B, p. 1; Mike Godwin, "Solo Contendere: Free Speech vs. Sex Discrimination Online," *Internet World*, February 1995, 90-93.

[11] Peter H. Lewis, "Censorship growing on networks of cyberspace," *Dallas Morning News*, 29 June 1994, sec. D, p. 2(F).

[12] Evelyn Richards, "Dissident Prodigy Users Cut Off From Network," *Washington Post*, 3 November 1990, sec. C, p. 1.

"To some, this practice amounted to censorship of what many have come to regard as an electronic arena for a full and free exchange of ideas."[13] One former user quoted in the *Chicago Tribune* said: "If you look 20 or 30 years out, and you think what will happen to political debates, this is where they will occur."[14]

There is a strong tradition of free speech among members of online communities. One of the earliest computer bulletin boards, the CommuniTree based in San Francisco, was created by people who thought mediation would revolutionize communication.

> "The opening sentence of the prospectus for the first conference was 'We are as gods and might as well get good at it.' This technospiritual bumptiousness, full of the promise of the redemptive power of technology mixed with the easy, catch-all Eastern mysticism popular in upscale northern California, characterized the early conferences."[15]

The Internet, which began as a network of military computers, exists because the organizations which now maintain it — universities, think tanks and government agencies — want to exchange information. Online exchanges were intended to be a kind of intellectual swap-meet, in which researchers and scholars could share ideas and discoveries.

However, agreement seems to be growing that there will have to be some kind of information filter on the Internet so the number of messages put forth will not overwhelm users.[16] Indeed, the CommuniTree died because its system operators could not effectively purge the overwhelming number of obscene and obnoxious messages posted by young hackers.[17]

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[13] Taylor, "Users say computer network is muzzling their give-and-take," 1.

[14] Ibid., 4.

[15] Allucquere Rosanne Stone, "Will the Real Body Please Stand Up?" in *Cyberspace: First Steps*, ed. Michael L. Benedikt (Boston: MIT Press, 1991), p. 90.

[16] Vint Cerf, interview by Steve Cisler, *Wired*, December 1994, 154; Joan Konner, "It's the Content, Stupid," *Columbia Journalism Review*, November/December 1994, 4.

[17] Stone, p. 91.

No clear guidelines yet exist on who controls content on the nation's information network. A few speech cases involving online providers have moved into the courts, but only one has yet been resolved. In that case, *Cubby v. CompuServe*, the U.S. District Court in Southern New York based its decision on an analogy between CompuServe and traditional news vendors, such as libraries and booksellers.[18] Because no legislation or administrative guidelines have outlined freedom of speech rights on the network, other courts may be likely to follow the district court's example and base their decisions on speech rights established in other media. Thus, the amount of protection offered to online users in different situations could depend on what analogy the courts use in particular sets of circumstances.

This paper will examine the analogies between online providers and other media that have been proposed thus far. It will evaluate the suitability of each analogy and attempt to gauge how much protection speakers would have if a particular analogy was adopted. For the purposes of this paper, the term online provider will refer to organizations that both provide access to the Internet, bulletin boards and databases and produce material that is available in those forums. Those organizations include private companies, such as America Online, Prodigy and CompuServe; public institutions, such as universities and government agencies; and community organizations, such as the Well. The term will not apply to organizations such as the *New York Times*, MTV and Dow Jones Co., which produce material but do not provide access.

One cautionary note, this study focuses on the right of online users to gain access to online providers in order to transmit messages. The other interest online users have is in gaining access to read others' messages. Access rights for the two purposes may not be identical, and users' rights to read messages bears looking into. However, that is beyond the scope of this paper.

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[18] *Cubby v. Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991)

NEWS VENDOR

The only legal precedent for deciding what freedom of speech rights online providers have is *Cubby v. CompuServe*, a 1991 libel case. The plaintiffs, Cubby, Inc. and Robert Blanchard sued CompuServe, its contractor that provides material to CompuServe's journalism forum, and Don Fitzpatrick, publisher of Rumorville USA, a daily newsletter covering broadcast journalism. Blanchard contended that Fitzpatrick had published libelous statements about him in Rumorville and that CompuServe and its contractor had republished the statements by making them available online.

CompuServe requested summary judgment, saying it was only a distributor and not a publisher of the newsletter. Distributors, such as news vendors, libraries and bookstores are not held responsible for defamatory statements that appear in the publications they carry if they have no knowledge of the defamation.[19]

The U.S. District Court in Southern New York granted CompuServe summary judgment, agreeing that it is a distributor, not a publisher, of the contents of its forums.

> "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[20]

The case did not resolve whether Cameron Communications, Inc., the company that provides material for CompuServe's journalism forum, is a publisher or distributor of the allegedly libelous statements.

Some legal scholars disagree with the district court's decision. Edward V. DiLello said the analogy between CompuServe and traditional distributors is inappropriate because CompuServe has technological capabilities that libraries and bookstores do not.

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[19] Ibid., 139.

[20] Ibid., 140.

> "Software is in use that is designed to search masses of text and pick out concepts rather than key words by searching for word relationships that conform to a complex model generated by the software based on input from the user. The existence of such software programs suggests that a company managing a large flow of data, like CompuServe, may be able to flag articles containing phrases that conform to a typical profile of a libelous statement, allowing a human operator to examine them and check for accuracy."[21]

Recently, Prodigy supervisors have begun using this kind of software to find potentially offensive messages and warn users to erase the messages or have them censored.[22]

Online providers' ability to censor, however, is beyond the point. It is clear from the district court's decision that the judge held CompuServe to the same standard as a library or bookstore because CompuServe serves the same function — not because it has the same limitations. The judge said:

> "A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information."[23]

Regardless of the appropriateness of the news vendor analogy, the case poses problems for people interested in the free speech rights of online users. The court addresses the issue of access to CompuServe briefly and only tangentially to the issues of the case, saying: "While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents."[24]

Thus, the court implies CompuServe has discretion over who is allowed access to its forums. Whether the court allows CompuServe, as a distributor, leeway to edit content once it is online is unclear. It seems that the court is saying that since CompuServe has chosen not to edit its forums' content, the online provider can have distributor status. If CompuServe did edit its forums' content, it might lose its distributor status and become a publisher. The decision, however, seems to be left to CompuServe.

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[21] Edward V. DiLello, *Functional Equivalency and It's Application to Freedom of Speech on Computer Bulletin Boards*, 26(2) Columbia Journal of Law and Social Problems 199, 213-14 (Winter 1993).

[22] Lewis, "Censorship growing on networks of cyberspace," 2.

[23] *Cubby v. CompuServe*, 140.

[24] Ibid.

NEWSPAPER

While CompuServe's owners have shunned the role of publisher, Prodigy's executives have said they should be compared to newspaper publishers. They have absolute control over the messages spread through their lines, and they want to retain that control. Geoffrey Moore, Prodigy's director of market programs and communications, said:

> "The First Amendment protects private publishers, like the *New York Times* and Prodigy from Government interference in what we publish. The Constitution bestows no rights on readers to have their views published in someone else's private medium. What the Constitution does give readers is the right to become publishers themselves."[25]

Moore is correct. If courts determine that online providers are analogous to newspapers, the owners will have veto power over all content. Newspapers historically have been the forums of their owners, and the U.S. Supreme Court confirmed the power of the publisher in *Miami Herald Publishing Co. v. Tornillo*. In this 1974 case, a candidate for the Florida House of Representatives sued the *Miami Herald* under Florida's "right of reply" statute. The *Herald* had published editorials critical of Tornillo, and he wanted the paper to print his response. The court, in an opinion written by Chief Justice Warren Burger, said newspapers' autonomy could not be abridged:

> "A newspaper is more than a passive receptacle or a conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[26]

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[25] Geoffrey Moore, "The First Amendment Is Safe at Prodigy," *New York Times*, 16 December 1990, sec. 3, p. 13.

[26] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

SHOPPING MALL

Following Prodigy's revocation of users' access rights, several people, including representatives of the American Civil Liberties Union and Computer Professionals for Social Responsibility, proposed that online providers be compared to shopping malls, which are considered public forums in some states.[27] Public forums, such as public streets, are places where people have historically been free to speak and distribute handbills and other materials.[28] In particular, this model has been suggested for companies like Prodigy, which carry advertising as well as non-commercial material.

However, the shopping mall analogy has several problems. For example, the status of shopping malls varies from state to state, and only a few states recognize a right of access to them. While the U.S. Supreme Court originally said shopping centers were public forums, it back tracked on that decision a few years later. Most recently, it said states may go beyond the First Amendment and protect citizens' right to speak in shopping malls, but there is no Constitutional protection of speech in these areas. Further, in all four of the shopping mall cases, the court hinged its decision on what other forums were available.

In the first case, *Amalgamated Food Employees Union v. Logan Valley Plaza*, the court said shopping malls were public forums because they serve the same function as towns' business districts.[29] In writing the opinion, Justice Thurgood Marshall drew on the court's decision in *Marsh v. Alabama*, which said the business district in a company town is a public forum, just as it would be in any other town.[30] He said: "The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[31]

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[27] Jerry Berman and Marc Rotenberg, "Free Speech in an Electronic Age," *New York Times*, 6 January 1991, Business section, p. 13.

[28] Don Pember, *Mass Media Law*, 6th ed., (Dubuque, IA: WCB Brown & Benchmark Publishers, 1993), 100.

[29] *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968).

[30] *Marsh v. Alabama*, 326 U.S. 501 (1946).

[31] *Amalgamated Food Employees v. Logan Valley Plaza*, 318.

However, Marshall was careful to qualify his opinion by saying that functional equivalency did not mean that access to the mall could never be restricted. He noted: "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the state."[32]

Four years later, the High Court, in an opinion written by Justice Lewis Powell, backtracked, limiting the *Logan Valley* decision to instances where the picketing pertained to the shopping mall's operation. In its decision in *Lloyd Corp v. Tanner*, the court said its previous decision was limited to cases where the picketing pertained "to the use to which the shopping center property was being put" and where "no other reasonable opportunities for the pickets to convey their message to their intended audience were available."[33]

In *Lloyd*, the plaintiffs had been distributing handbills that protested the draft and the Vietnam War. Upon being told to leave the shopping mall, the protesters moved to a nearby public sidewalk. Powell said: "It would be an unwarranted infringement of property rights to require them [the mall owners] to yield to the exercise of the First Amendment rights under circumstances where adequate alternative avenues of communication exist."[34]

Further, he added: "...this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on private property owned and used nondiscriminatorily for private purposes only."[35]

Four years later, the U.S. Supreme Court said pickets did not have a right of access to shopping malls even when their picketing related to commercial activity in the mall. In overturning *Logan Valley*, the court said the First Amendment only protects speech from government interference. The opinion, written by Justice Potter Stewart, said:

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[32] Ibid., 320.
[33] *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972).
[34] Ibid., 567.
[35] Ibid., 568.

> "Thus while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself."[36]

Stewart noted the inconsistency in the court's previous cases:

> "If a large self-contained shopping center is the functional equivalent of a municipality, as Logan Valley held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content. For while a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities, what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression."[37] (citations omitted)

Finally, in 1980, the court visited the issue one more time in *Pruneyard Shopping Center v. Robins*. In a decision written by Justice William Rehnquist, the court said states—in that case California—may go beyond the First Amendment and require shopping malls to serve as public forums. The shopping mall owners said the state requirement violated their rights by taking their property without just compensation and forcing them to associate with speech they do not support.

The court said the owners were not being deprived of their property because high school students' collection of signatures on a petition will not "unreasonably impair the value or the use of their property as a shopping center."[38] The court also said that the owners probably would not be associated with the students' views because the shopping mall is open for use by the general public.[39]

From these decisions, one can see that certain criteria used by the court to determine whether members of the public have a right of access to private property would foster claims of a right of access to online providers. For example, the court has said the property must be open to the public—or at least open to the portion of the public that includes the speaker—in order for there to be a right of access. Some online providers solicit public use of their services. The private companies, such as Prodigy and CompuServe, can only make money if people subscribe. They advertise and offer special rates to new customers to encourage them to sign on. Publicly owned systems, such as those run by universities, do not solicit new users, but they make their services available to large groups of people. University online services are open to all students, staff and faculty in the same way their athletic centers are.

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[36] *Hudgens v. National Labor Relations Board*, 425 U.S. 507, 513 (1976).

[37] Ibid., 520.

[38] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

[39] Ibid., 87.

However, there are aspects of the shopping mall decisions that make them hard to apply to online providers. First, shopping malls are public forums if the state in which they are located says they are. Online services cross state boundaries, creating a myriad of choice of law problems. If America Online, based in New York, denies access to a person who lives in California and connects through a California phone number, does New York or California law apply? What happens when a bulletin board supervisor, who is based in Texas, deletes a message posted by a user in Montana, who has subscribed to a service based in New York?

Second, shopping malls are privately owned, and the court has given owners special consideration because of the Fifth Amendment's provision against the taking of private property without just compensation. Online providers are a mix of privately- and publicly-owned entities. A private company, like America Online, may have the right to deny access, but that does not mean a publicly-owned service does. This goes back to the analogy of shopping malls and public streets. A mall owner can deny pickets access to his mall, but the city council cannot deny pickets access to public sidewalks. Even among public entities, freedom of access varies. Speech that would be protected in other public places can be censored on school campuses.[40] The shopping mall analogy has appeal—at least at first glance—but presents problems in application.

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[40] *Fraser v. Bethel School District*, 106 S.Ct. 3159 (1986); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

BROADCASTING

Few have suggested that regulation of online providers model that of broadcasting or cable operators. Those models, however, are worth examining because both, like the Internet, involve the use of public property by private companies. In talking about the national information infrastructure, Vice President Al Gore said:

> "We are steering a course between a kind of computer-age Scylla and Charybdis—between the shoals of suffocating regulation on one side, and the rocks of unfettered monopolies on the other. Both stifle competition and innovation.
>
> "The Clinton Administration believes, though, that as with the telegraph, our role is to encourage the building of the national information infrastructure by the private sector as rapidly as possible."[41]

The government has tried to steer a similar course with broadcasting; allowing private companies to build and run the system with moderate government regulation.

Historically, the government has seen broadcasting's airwaves as a public good. Because the number of signals that could be sent over those airwaves was limited, regulation was seen as a necessity. When the National Broadcasting Company (NBC) appealed some of the Federal Communications Commission's regulations in 1943, the U.S. Supreme Court, in an opinion written by Justice Felix Frankfurter, said: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."[42]

But while the government restricted the number of broadcasting operators, it also took steps to make sure those operators shared their wealth. It required broadcasters to provide air time to candidates for federal office, and it established the Fairness Doctrine, which required broadcasters to cover controversial public issues. The Fairness Doctrine also required broadcasters to include all significant viewpoints in its coverage of these issues. As a result of the Fairness Doctrine, broadcasting became the one medium in which speakers had grounds to demand that a private company promote their views.

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[41] Al Gore, "Remarks by Vice President Al Gore," speech prepared for the National Press Club, Washington, D.C., 21 December 1993, in *Taking Sides: clashing views on controversial issues in mass media and society*, 3rd ed., eds. Alison Alexander and Janice Hanson (Guilford, Conn.: Dushkin Publishing Group, Inc., 1995), 327.

[42] *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 226 (1943).

Broadcasters argued that the Fairness Doctrine abridged their First Amendment rights because it forced them to carry messages in lieu of ones they preferred. In response, the U.S. Supreme Court, in an opinion written by Justice Byron White, said:

> ". . . as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[43]

Following that case, *Red Lion Broadcasting Co. v. FCC*, improvements in broadcasting technology increased the number of usable frequencies, and the growth of cable television offered an alternative to broadcasting. In 1985, the Federal Communications Commission did a study of the effects of the Fairness Doctrine and concluded that it did not enhance discussion of public issues. Broadcasters who were afraid of being forced provide air time to many viewers with opposing viewpoints shied away from covering controversial issues. In a 1986 case, U.S. Court of Appeals Judge Robert Bork said the Fairness Doctrine was not actually a part of the Communications Act.[44] The FCC subsequently abolished the doctrine, although its ancillary rules on personal attacks remain in effect.[45] Thus, in broadcasting as in other media, access now lies largely at the discretion of channels' owners.

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[43] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969).

[44] *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C.Cir. 1986).

[45] *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C.Cir. 1989); Pember, pp. 589-591.

CABLE TELEVISION

Virtually no one has suggested that regulation of the nation's computer network be modeled on that of cable television, probably because cable regulations are complex and unstable. Congress passed major acts regarding cable in 1984 and 1992, and many regulatory guidelines are still unclear. However, speakers' rights of access to cable are worth a brief look since it is possible that cable and computer lines will merge, making the two media fairly indistinguishable.

As with broadcasting, government regulation began because of cable operators' use of public goods. In some areas, cable television companies use public utility poles and other public spaces to run their lines. In order to limit the number of utility lines strung in a given area, government bodies, such as cities and counties, have limited cable television operators to one or two in each region.[46] And because the number of cable operators is limited, the government saw fit to regulate how cable operators allocate their channels.

Federal regulations specify that cable operators must allocate between 10 and 15 percent of their channels to programmers who are not affiliated with the cable operator.[47] This regulation was created specifically to promote competition in programming and diversity in information sources.[48] In addition, the federal government gives franchising authorities, such as cities, the power to require cable operators to designate channels for public, educational or governmental use. Cable operators are not allowed to exercise editorial control over programming on those channels.[49] And finally, cable operators are required to carry qualified non-commercial, educational television stations and at least three local television stations.[50]

Turner Broadcasting System challenged the regulations requiring cable operators to carry local and non-commercial, educational television stations, but the U.S. District Court in the District of Columbia said they do not violate cable operators' First Amendment rights. In its decision, the court placed great emphasis on the fact that competition from cable had placed local broadcast stations in economic jeopardy. It also somewhat side-stepped the issue of freedom of speech. The court's opinion said:

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[46] *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

[47] *Cable Communications Policy Act of 1984, U.S. Code*, v. 47, secs. 531-2 (1994).

[48] Ibid.

[49] Ibid.

[50] *Cable Television Act of 1992, U.S. Code*, v. 47, sec. 534 (1994).

> "This Court is of the opinion that, in enacting the 1992 Cable Act, Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity never the less; not a market in "speech." The commodity Congress undertook to regulate is the means of delivery of video signals to individual receivers. It is not the information the video signals may be used to impart."[51]

The U.S. District Court in Northern California, however, did say channel allocation requirements can violate cable operators' rights.[52] The City of Palo Alto required cable operators to provide two government channels, three public and education channels, and eight leased channels to unaffiliated programmers. Noting that such regulations would violate the First Amendment if they were applied to newspapers, the court said:

> "First, forcing a speaker to communicate the views of another undoubtedly impacts the content of the speech of the primary speaker. In the case of the traditional press, and in this Court's opinion CTV operators, this impact is inconsistent with the principles of the first amendment. See id. The Cities cannot deny that PEG channels, which are directly or indirectly controlled by city government, could very well provide a conduit for criticism of the CTV operator."[53] (footnote omitted)

It went on to say:

> "Admittedly, the access channels provide other cable speakers regular and constant access that is not necessarily dependent on the content of any franchisee's speech. The content sought to be cablecast by the access users, however, will be influenced by what the franchise cablecasts (why cablecast programming that is already on another channel?), and the reverse is also certain to be true: the material on the access channels will influence what the franchisee presents on its channels."[54]

The federal regulations allow cable operators to retain control over some of their channels, which keeps them from becoming common carriers. But the district courts disagree on whether or not the access requirements interfere with the cable operators' own speech. The U.S. District Court in the District of Columbia said the access requirements do not interfere with cable operators' speech and only foster competition among cable and television programmers. The U.S. District Court in Northern California clearly disagreed, saying programmers could not help influencing others. This provides an interesting conflict when applied to computer networks. With ever-improving technology, online providers will be able to provide access to nearly anyone who wants it, plus transmit their own material. In this instance, the District of Columbia court would say that access requirements will not hurt online providers and will provide the benefit of additional voices. But the Northern California court would say that each person an online provider allows access will influence the messages of other users. If one agrees with the Northern California court's view, one must then ask if the additional users who gain access by government order inhibit or contribute to the public discussion. Does their sending of messages inhibit others from sending? Or does the addition of their messages enrich the material that was already available?

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[51] *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 40 (D.D.C. 1993).

[52] -*Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552 (N.D.Cal. 1987).

[53] Ibid., 1555.

[54] Ibid.

COMMON CARRIER

Some people who clearly think the more speakers, the better the discussion have proposed that online providers become common carriers.[55] Common carriers, such as telephone companies, carry all messages from all customers as long as they pay their bills. Congress, however, has not imposed common carrier status on communications media that provide news, educational material or entertainment programs. Instead, common carrier status has been limited to the mail, telephone and telegraph — media which provide vehicles for others' messages.

In 1979, the U.S. Supreme Court struck down Federal Communications Commission regulations that required cable operators to make channels available to the public, educational institutions and bodies of the local government. The court said the regulations wrongly imposed common carrier status on cable operators. In the court's opinion, Justice Byron White noted that a common carrier provision originally in the Communications Act of 1934 had been deleted before the act was passed. He said: "The provision's background manifests a congressional belief that the intrusion worked by such regulation on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access."[56]

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[55] Steve Lohr, "The Nation: Who will control the digital flow?" *New York Times*, 17 October 1993, sec. 4, p. 1(F).

The court's decision did not bar Congress from imposing common carrier status on cable operators if legislators saw fit. It merely said the Federal Communications Commission does not have the power to do so. Thus, Congress could make online providers act as common carriers. However, it seems unlikely that legislators would do so when they have avoided this option with other comparable media.

CONCLUSION

While the courts may look at speech rights in older media for guidance in solving questions of First Amendment rights on the information superhighway, it seems unlikely that they will be able to adopt any regulatory model verbatim. The information superhighway is unlike any medium people have had access to previously. Like the telephone, it has the potential to carry messages from anyone to anyone. But it also has the potential to carry messages from anyone to everyone. Where there has been only a limited number of broadcasters and publishers, there can now be an infinite number.

But universal access is not cheap. The government has had to subsidize telephone service in some areas to approach universal service in that medium. It will not do the same thing with the information superhighway. The Clinton administration has said it expects the information superhighway to be built by private investors, and last year, the National Science Foundation, which had maintained the Internet's backbone, announced that it would turn the network over to private companies.[57]

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[56] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979).

[57] Harmon, "At 25, the Internet readies move into free market," 1.

With the advent of privatization, the issue of access becomes more complicated. Few people can afford their own Internet connection. Unless their job or school provides access, most users will have to connect through a private service, such as Prodigy or America Online. Therefore, a free speech policy that will address future conditions will have to give consideration to people's right to speak in a medium owned by others. Historically, the government's position on this issue has been one of laissez faire. Newspaper owners have always had the right to reject submissions. In the past decade, broadcasters have been given more control in this area. Even booksellers and libraries have the right to not carry certain works. It seems that the courts—and legislators if they establish a policy—must give some weight to these precedents.

However, as strong as the tradition of free enterprise is, the nation also has a tradition of free speech and public participation in issues of importance. Granted, free speech rights have been impinged upon during certain points in our nation's history; these rights also have been strengthened and broadened to include more areas of speech in the post-World War II era. And granted, public participation in the discussion of political and social problems has withered in the late 20th century; the growing computer network with its promise of universal access may help solve that problem.

The balance between free enterprise and free speech is an uncertain one. In *Technologies of Freedom*, Ithiel de Sola Pool laments the government's willingness to sacrifice open competition among electronic-media owners in order to preserve free speech. In the end, this policy backfired by slowing the development of communications technologies and fostering monopolies. For example, Congress began regulating broadcasting in the 1920s because too many broadcasters were clogging up the spectrum with their transmissions. Messages got lost in the mess. But Pool says while frequency scarcity was used to justify regulation of broadcasting, frequency scarcity only existed because companies were not forced by competition to develop equipment that used the spectrum efficiently. With the more efficient equipment that now exists, frequencies are plentiful.[58] According to Pool, open competition is the best way for communication to grow.

In the 12 years since the publishing of *Technologies of Freedom*, the government has moved more toward the policy Pool advocated. Congress, the Federal Communications Commission and the courts have moved away from regulation, allowing media owners more say in what messages they carry.

The courts in particular have been reluctant to interfere with the editorial control of media managers. This reluctance stems from the First Amendment's application to newspapers. The government is forbidden from censoring newspapers. It is also forbidden from mandating content. The U.S. Supreme Court has been very clear in stating its belief that editing should be left to editors. In *Miami Herald Publishing Co. v. Tornillo*, it said: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[59]

In the past two decades, the U.S. Supreme Court has extended its protection of editors' control to electronic communication. Broadcasters now exercise almost complete editorial control, and cable operators have more control over the use of their channels. If online providers can show that they have an editorial function, particularly one akin to that of newspaper journalists, courts probably will be reluctant to second-guess them and regulate their content.

Also, courts have shied away from making private individuals promote others' speech. When individuals—or companies—allow others' messages in their forum, they run the risk of being associated with those messages. Courts have said that forcing this association is a violation of the property owners' rights. In 1977, the U.S. Supreme Court said New Hampshire could not require its citizens to carry license plates bearing the message "Live Free or Die" on their cars. In the court's opinion, Chief Justice Warren Burger said:

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[58] Ithiel de Sola Pool, *Technologies of Freedom*, (Cambridge, MA: Belknap Press of Harvard University Press, 1983), pp. 152-153.

[59] *Miami Herald Publishing Co. v. Tornillo*, 256.

> "...we are faced with a state measure which forces an individual as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the state 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'"[60] (citation omitted)

In another case, in which a privately-held utility company was ordered to include notices from a consumer protection group in envelopes with customers' utility bills, the U.S. Supreme Court said the order violated the utility company's First Amendment rights even though the company could put a disclaimer on the notices.[61] The inclusion of the notices still forces the utility company to associate with them, the court said.

Online providers can make a good argument that they will be associated with the messages of any user to whom they give access. More and more novice users are subscribing to online services, and these users may have difficulty distinguishing what messages were posted by the online provider, what messages were generated by contractors who create text and other material for online providers, and what messages came from other subscribers. Already, many users get confused about what host computer a message is posted on, and as the seams between online providers and the Internet become less visible, users may find it more and more difficult to determine a message's origin. Thus, subscribers to a particular online provider may associate the messages they read with that provider, making the content of those messages a concern for the company.

With these two considerations in mind, it seems unlikely that the government will force online providers to make universal access available. More likely, the government will encourage the growth of multiple providers so that a person turned away by one can seek access through another. This may disappoint people who think the information superhighway should be open to all, but it is a policy in keeping with recent judicial interpretation of the First Amendment. And if printing presses go the way of Alexander Meiklejohn's admired town meetings, citizens may be thankful the First Amendment has been applied strictly to electronic media. As Pool said:

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[60] *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

[61] *Pacific Gas and Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986).

> "Networked computers will be the printing presses of the twenty-first century. If they are not free of public control, the continued application of constitutional immunities to nonelectronic mechanical presses, lecture halls, and man-carried sheets of paper may become no more than a quaint archaism, a sort of Hyde Park Corner where a few eccentrics can gather while the major policy debates take place elsewhere."[62]

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[62] Pool, p. 225.

BIBLIOGRAPHY

Berman, Jerry, and Rotenberg, Marc. "Free Speech in an Electronic Age." *New York Times*, 6 January 1991, Business section, p. 13.

Booker, Ellis, and Betts, Mitch. "Democracy goes on-line." *Computerworld*, 31 October 1994, 1.

Bulkeley, William M. "Censorship Fights Heat Up on Academic Networks." *Wall Street Journal*, 24 May 1993, sec. B, p. 1.

Cerf, Vint. Interview by Steve Cisler. *Wired*, December 1994, 154.

DiLello, Edward V. *Functional Equivalency and It's Application to Freedom of Speech on Computer Bulletin Boards*. 26(2) Columbia Journal of Law and Social Problems 199 (Winter 1993).

Godwin, Mike. "Solo Contendere: Free Speech vs. Sex Discrimination Online." *Internet World*, February 1995, 90-93.

Gore, Al. "Remarks by Vice President Al Gore." Speech prepared for the National Press Club, Washington, D.C., December 1993. In *Taking Sides; clashing views on controversial issues in mass media and society*, 3rd ed. Eds. Alison Alexander and Janice Hanson. Guilford, Conn.: Dushkin Publishing Group, Inc., 1995.

Grimes, William. "Computer as a Cultural Tool: Chatter Mounts on Every Topic." *New York Times*, 1 December 1992, sec. C, p. 13.

Harmon, Amy. "At 25, Internet readies move into free market." *Los Angeles Times*, 5 September 1994, sec. A, p. 1(H).

Ingber, Stanley. *The Marketplace of Ideas: A Legitimizing Myth*. Duke Law Journal 1 (February 1984).

Kalven, Harry Jr. *The New York Times Case: A Note On "The Central Meaning of The First Amendment."* Supreme Court Review 191 (1964).

Karraker, Roger. "D.C. embraces 'electronic democracy:' White House, Congress use e-mail for citizen feedback." *MacWeek*, 21 June 1993, 10.

Konner, Joan. "It's the Content, Stupid." *Columbia Journalism Review*, November/December 1994, 4.

Lewis, Peter H. "Censorship growing on networks of cyberspace." *Dallas Morning News*, 29 June 1994, sec. D, p. 2(F).

Lewis, Peter H. "America Online says users of service exceed 1 million." *New York Times*, 17 August 1994, sec. D, p. 4(L).

Lohr, Steve. "The Nation: Who will control the digital flow?" *New York Times*, 17 October 1993, sec. 4, p. 1(F).

Meiklejohn, Alexander. *Political Freedom; the constitutional powers of the people*. New York: Harper & Brothers, Publishers, 1960.

Moore, Geoffrey. "The First Amendment Is Safe at Prodigy." *New York Times*, 16 December 1990, sec. 3, p. 13.

Pember, Don. *Mass Media Law*, 6th edition. Dubuque, IA: WCB Brown & Benchmark Publishers, 1993.

Pool, Ithiel de Sola. *Technologies of Freedom*. Cambridge, MA: Belknap Press of Harvard University Press, 1983.

Richards, Evelyn. "Dissident Prodigy Users Cut Off From Network." *Washington Post*, 3 November 1990, sec. C, p. 1.

Stone, Allucquere Rosanne. "Will the Real Body Please Stand Up?" In *Cyberspace: First Steps*. Ed. Michael L. Benedikt. Boston: MIT Press, 1991.

Taylor, Marianne. "Users say computer network is muzzling their give-and-take." *Chicago Tribune*, 7 January 1991, Business section, p. 1.

CASES

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)

Bigelow v. Virginia, 421 U.S. 809 (1975)
Century Federal, Inc. v. City of Palo Alto, 710 F.Supp. 1552 (N.D.Cal. 1987)
Cubby v. Compuserve, 776 F.Supp. 135 (S.D.N.Y. 1991)
FCC v. Midwest Video Corp., 440 U.S. 689 (1979)
Fraser v. Bethel School District, 106 S.Ct. 3159 (1986)
Hudgens v. National Labor Relations Board, 425 U.S. 507 (1976)
Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)
Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986)
Marsh v. Alabama, 326 U.S. 501 (1946)
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)
National Broadcasting Co. v. U.S., 319 U.S. 190 (1943)
New York Times v. Sullivan, 376 U.S. 254 (1964)
Pacific Gas and Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986)
Penthouse v. McAuliffe, 610 F.2d 1353 (1981)
Pope v. Illinois, 107 S.Ct. 1918 (1987)
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)
Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C.Cir. 1989)
Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C.Cir. 1986)
Tinker v. Des Moines School District, 393 U.S. 503 (1969)
Turner Broadcasting System, Inc. v. FCC, 819 F.Supp. 32 (D.D.C. 1993)
Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc., 425 U.S. 748 (1976)
Wooley v. Maynard, 430 U.S. 705 (1977)

Retractions to Avoid Libel Suits: The Uniform Correction or Clarification of Defamation Act Versus Tennessee Law

by

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Abstract

Retractions to Avoid Libel Suits: The Uniform Correction or Clarification of Defamation Act Versus Tennessee Law

Provisions of the new Uniform Correction or Clarification of Defamation Act were compared to existing state laws. Tennessee newspaper editors and managing editors were surveyed by mail. Respondents were asked if they would retract or support two stories included in the survey, one pertaining to a public figure and the other to a private citizen, under provisions of current Tennessee law and the Uniform Correction or Clarification of Defamation Act. Under Tennessee law, editors' employment time at their current newspaper was significantly statistically related to retraction of the public figure story. Editors employed with the newspaper for the least amount of time were more likely to retract the story than editors employed for a greater amount of time. Under the uniform Act, editors threatened the least with libel action were significantly more likely than editors who had been threatened frequently to retract the public figure story. Also, editors were significantly more likely to retract a truthful story about a private citizen in order to bar or terminate a libel lawsuit, a provision of the uniform Act. The uniform Act was also linked to an overall increase in the likelihood to retract stories, but this finding was not statistically significant.

Abstract

Retractions to Avoid Libel Suits: The Uniform Correction or Clarification of Defamation Act Versus Tennessee Law

Uniform Correction or Clarification of Defamation Act provisions were compared to existing state laws. Among other statistically significant findings, results of a mail survey of Tennessee editors and managing editors show respondents were more likely to retract a truthful story about a private citizen under uniform Act provisions. These findings suggest the uniform Act may undermine the press' obligation to report news the public needs by making editors more likely to retract truthful stories.

Retractions to Avoid Libel Suits: The Uniform Correction or Clarification of Defamation Act Versus Tennessee Law

Overview

An October 5, 1981, report in The Washington Post's Ear column discussed a rumor that former President Jimmy Carter had bugged the Blair House while president-elect and Mrs. Reagan were residing there prior to the inauguration (cited in Ackerman, 1994). After some posturing, the Post published a retraction and apology praising the former President's record in matters pertaining to the right of privacy and stated, in part, "We now believe the story...to have been wrong." As a consequence, Carter decided not to sue the Post for libel. The dispute was resolved in 18 days.

State-by-state enactment of the Uniform Correction or Clarification of Defamation Act, as adopted by the American Bar Association in February 1994, may encourage the early resolution of more disputes in this manner. However, it may also tempt some newspapers to run retractions on truthful, but reputation-harmful, stories in order to avoid potential damages in a libel suit. The truth-telling responsibility of the free press may be undermined. The purpose of this study, therefore, is to determine when retractions are utilized by the press and what impact, if any, the uniform Act may have if enacted.

Review of the Problem

Libel

Damages.

A study of 1992-93 libel suits by the Libel Defense Resource Center, as reported by Garneau in Editor & Publisher (1994), showed that of the 11 libel cases lost by the media, two awards were more than $1 million. One was a $7.5 million verdict. The median award was $159,000. The same study revealed that three of the damage awards included punitive damages, which averaged $564,000. Although the findings represented a decline in the number of trials, losses and "mega awards" against the media, Libel Defense Resource Center general counsel Kaufman warned not to understate their significance, "Libel awards averaging in excess of $1 million are still a chilling phenomenon" (1993, p. 29).

The chilling effect.

The notion of chilling effect is firmly rooted in American Constitutional Law and was expressed by Justice Brennan in New York Times Co. v. Sullivan (1964):

> Critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make statements which steer far wider of the unlawful zone. (p. 725)

Three of the most recent studies on libel and chilling effect were conducted by Anderson and Murdock (1981), Hansen and Moore (1989), and Bowles and Marcum (1990). Using a national mail survey, Anderson and Murdock (1981) found that more than eight out of 10 editors said they were not "less aggressive" when deciding to print potentially libelous passages. Almost three-fourths of the sample agreed they were "increasingly careful" when editing stories due to libel suits and the threat of libel suits. Hansen and Moore (1989) developed an eight-item index of responses to Likert scale questions to measure chilling effect in order to determine the impact, if any, of threatened and actual libel suits on small circulation newspapers. They used mail surveys of editors and/or publishers of Kentucky's 167 newspapers with a circulation of 50,000 or less. Their findings suggest that even the threat of a libel suit may chill smaller papers. Respondents who had been threatened at least once scored significantly higher on the chill index than those who had not been threatened.

Newspapers owned locally or by local corporations were significantly more likely to be chilled by a threatened libel suit than those owned by regional and national chains. A similar study on libel chill was conducted by Bowles and Marcum in Tennessee (1990). Bowles and Marcum found that 67 percent of editors responding (rate = 41.3%) reported their paper had been threatened with a libel suit during the past five years and those who had been threatened showed greater fear of libel. The Tennessee study, unlike the one in Kentucky, did not find statistically significant positive relationships between the chilling effect scale and type of ownership. Bowles and Marcum did find a significant positive relationship between chilling and use of a private attorney for pre-publication review. They also found daily newspapers were significantly more likely to be chilled than weekly newspapers.

In an article in the Columbia Journalism Review, based on more than 150 interviews with media editors and lawyers, Massing (1985) cited numerous examples in which the fear of a defamation action was given as the reason for a no-publication decision. Editors of papers which had been sued and had paid damages in the past were reported to be particularly sensitive to the threat of a defamation action.

Corrections and Retractions

History.

One of the easiest ways a newspaper can mitigate damages awarded to the injured is to publish a full and prompt apology following the publication of a possibly libelous story. Retraction as a way to restore a reputation marred by defamatory statements has a long history (Hermanson, 1992). The idea came to American law from English common law, and cases recorded in the United States as early as 1835 allow retraction in mitigation of damages in libel and slander. Although states began to adopt statutes concerning retraction in the 1880s, approximately 17 states have never had retraction statutes (Hermanson, 1992). Thirty-three states have retraction statutes, including Tennessee, but the number continuously fluctuates. Also, even in states with statutes, some common law retraction elements remain in use, and those states without statutes do recognize retraction of inaccurate information as admissible under the common law in mitigation of damages in defamation suits. The common law of defamation historically has held publishers liable for each article published, regardless of the source of the information, and there are several types of damages which could be awarded to plaintiffs in libel suits (Hermanson, 1992).

Whether the retraction is available under common or state law, as a legal remedy in libel retraction has two primary purposes. The first purpose is to guarantee that the "public," who read or heard the erroneous statement, is given the corrected facts so that the end truth will win out in the debate of ideas. A retraction, it is thought, adds information so readers or listeners can determine for themselves what the truth is. The second purpose is to limit the damage to an individual's reputation. As Hermanson (1992) maintained in her monograph on retractions, "If the information is corrected before word spreads to others or has time to become ingrained in the image society has of the individual, there is less likelihood of permanent damage to the reputation and future economic well-being of the individual" (p. 4).

State retraction statutes.

As of late 1993, 33 states have retraction statutes which vary in the terms and scope of their operation (Kaufman, 1993). Even though language, definitions, requirements, and consequences do vary, Hermanson said it is noteworthy that the "idea of retraction as a valid means of mitigation of damages has received legislative approval in each of these states when common law mitigation was already available to defendants" (1992, p. 10). Nonetheless, in his special report on retraction statutes prepared for the Libel Defense Resource Center, Kaufman (1993) lists the six areas in which differences among state retraction statutes are most likely to occur. They are 1.

timing of the retraction demand; 2. content of the retraction demand; 3. effect of the failure to demand a retraction; 4. timing of the retracting publication; 5. sufficiency of the correction, including placement of the correction, content of the correction, and determination of sufficiency; and 6. media coverage limitations.

1. Timing of the retraction demand

Libel defendants receive only minimal notice of potential claims under most of the current retraction statutes, according to Kaufman (1993). Six states--Arizona, California, Idaho, Nebraska, Nevada, and Oregon--require plaintiffs to demand a retraction within a specified period following publication of the alleged defamation. The remainder either do not require that a retraction demand be made, fail to specify the time within which it must be made, or simply require that a retraction demand precede commencement of an action. These latter demand periods range from 3 to 11 days prior to the action, so that theoretically defendants may not be aware of the pending claim until the statute of limitations is almost up.

The plain language of the Tennessee Retraction Statute (1955) indicates that no libel lawsuit in Tennessee can be brought against a newspaper or periodical without a five-day notice "in writing... specifying the article and the statements therein which he (plaintiff) alleges to be false and defamatory." However, the retraction statute has not been interpreted this way (King & Ballow, 1988, p. 44). In Langford v. Vanderbilt University (1956), a student newspaper published an allegedly libelous story about the plaintiffs. The plaintiffs failed to give the requisite statutory notice, and the defendant asked the court to dismiss the case on that ground. The court declined to do so. It held that the only effect of a failure to provide the notice is to preclude the recovery of punitive damages. "Subsequent cases, albeit reluctantly, have followed this Tennessee Supreme Court interpretation of the statute" (King & Ballow, 1988, p. 45).

In some states, retraction statutes, or portions thereof, have been declared unconstitutional because the failure to demand a retraction limits recoverable damages to pecuniary loss. In Madison v. Yunker (1978), for example, the Montana Supreme Court construed a retraction statute in light of a state constitutional open courts provision which provided, in pertinent part, that courts of justice are to be open to every person, and a speedy remedy afforded for every injury of person, property, or character (Montana Code Annotated, 1947). The court determined that the denial of general damages to a plaintiff who had failed to demand a retraction pursuant to Montana's retraction statute deprived the plaintiff of a remedy guaranteed under the state constitution.

Retraction statutes in other states, however, are not without their constitutional defenders. In California, a state without an open courts provision, a retraction statute protecting only media defendants was upheld against state equal protection and due process challenges (Werner v. Southern Cal. Associated Newspapers, 1950). When Werner was appealed to the California Supreme Court, the appeal was dismissed and the lower court decision affirmed (1951). Additionally, retraction statutes limiting recovery to special damages were upheld in the face of challenges based on open court provisions in Oregon (Davidson v. Rogers, 1978) and in Minnesota (Allen v. Pioneer Press Co., 1889).

2. Content of the retraction demand

According to Kaufman (1993), none of the current statutes require the plaintiffs' retraction demands to identify the defamatory meaning of the allegedly false statements or to provide any information concerning their falsity, although three states--Montana, Oregon, and Wisconsin--allow that the demand "may" refer to sources from which the true facts might be determined (Hermanson, 1992). Eighteen of the current state statutes, including Tennessee, require only that the plaintiff identify the allegedly false statements and 10 are entirely mute on the issue.

3. Effect of the failure to demand a retraction

The effects of a plaintiff's failure to demand a retraction within the statutorily specified period vary extensively (Kaufman, 1993). Sixteen states provide no penalties for the failure to demand a retraction. Seventeen states prevent the recovery of punitive damages in such instances, but in only eight of these states is this prohibition absolute. Even when this qualified limitation on punitive damages is applicable, in most jurisdictions plaintiffs remain able to recover general damages for harm to reputation and emotional distress. Only six statutes expressly limit plaintiffs to "special" damages, and two of those provide for recovery in all available categories when the publication was made with malice. In Tennessee, the retraction statute (1955) states, "The plaintiff shall recover only actual, and not punitive damages." It is unclear whether "actual" applies only to pecuniary damages or also to damages to hurt feelings (Hermanson, 1992).

4. Timing of the retracting publication

Also varying state-to-state is the time within which defendants must publish a retraction. According to Kaufman (1993), it ranges from 48 hours to 45 days. With the exception of eight states that require publication in an indefinite "reasonable time" and two states that entirely fail to address the issue of timing, all but one state require the retraction to be published within three weeks of the demand, regardless of the frequency of the publication. Eleven--or nearly one-half of the states that specify a time--require that the retraction be published within one week, and more than three-quarters require publication of a retraction within 10 days of the demand. In Tennessee, the retraction is to be published within 10 days after notice or in the next regular issue (Hermanson, 1992).

5. Sufficiency of the correction

A. Placement of the correction

Nearly all existing statutes are framed in terms of the mechanics of the placement of the published correction (Kaufman, 1993). The basic formulation--one that appears in 22 of the statutes--is that the correction be published in "substantially as conspicuous a manner" as the original article, usually with reference to the placement within the publication and typeface used. Some others call for an "equal degree of publicity," one requires that the statement be "public," and five require the retraction to be given greater emphasis than the initial publication. In Tennessee, the retraction is supposed to run on the front page (Hermanson, 1992).

B. Content of the correction and determination of sufficiency

Fully one-third of the 33 current retraction statutes, according to Kaufman (1993), provide no guidance as to what constitutes an adequate correction or retraction. Thirteen statutes specifically provide that the determination is to be made at trial. Tennessee's statute does not specify what an adequate correction is (1955).

6. Limited media coverage

Coverage of current retraction statutes is also limited, according to Kaufman (1993), as to types of publications and potential defendants. Only nine of the present statutes apply to all media and only one concerns all defendants. Three apply to newspapers only, five pertain to newspapers and periodicals only, and seven apply to assorted other groupings of media. Moreover, no existing statute appears to provide an easily workable mechanism for issuers of infrequent publications, such as books, to publish timely retractions. In Tennessee, the retraction statute is written for newspapers and periodicals.

A call for uniformity.

Because of this state-by-state variance of retraction statutes on various levels, Winfield has argued that the statutes are "old, flawed, and ineffective" (1993a, p. 5) and Hermanson has said they were "convoluted" (1992, p. 15). The American Bar Association's National Conference of Commissioners on Uniform State Laws in its prefatory note to the Uniform Correction or Clarification of Defamation Act maintained state retraction statutes have been largely "ineffective because they do not create sufficient incentives on both parties, the plaintiff and the defendant, to come to an agreement regarding retraction" (1994, p. 1).

The Uniform Correction or Clarification of Defamation Act is the American Bar Association's solution to the lack of similarity among the existing statutes and non-existence of retraction statutes in close to 20 states. According to Hite, president of the National Conference of Commissioners on Uniform State Laws, the Uniform Correction or Clarification of Defamation Act seeks to remedy "flaws in current law by providing strong incentives for individuals promptly to correct or clarify an alleged defamation as an alternative to costly litigation" (1994, p. 1).

Uniform Correction or Clarification of Defamation Act

History.

The Uniform Correction or Clarification of Defamation Act was a long time in coming, according to Kaufman's history of the Act (1993). The American Bar Association Uniform Law Commissioners approved a plan to draft a "Uniform Defamation Act" in August 1989. Initially, the Uniform Law Commissioners had in mind a more aspiring program than simply the reform of state retraction statutes. Indeed, the drafters of the Uniform Defamation Act were given a mandate to devise a "replacement system to reform the libel or defamation laws in the United States" (cited in Kaufman, p. xvii). Although it lingered in various drafts during most of the following four years, the comprehensive Uniform Defamation Act that was initially visualized was not to be. Characterized by the Libel Defense Resource Center as "radical and untested," the Defamation Act was forcefully opposed by media groups while attracting no consequential support from any other sector.

Buried within the Defamation Act's many "radical and untested" provisions, however, was a far more "traditional and less controversial" approach to the issue of reputational vindication which had so strongly motivated the Defamation Act's drafters (Kaufman, 1993, p. xvii). Included in the earliest drafts of the Defamation Act were provisions allowing the retraction of allegedly defamatory publications. Although otherwise opposed to the Defamation Act, the Libel Defense Resource Center from the outset expressed some degree of support for the retraction provisions. In fact, in its first major report on the Defamation Act, the Libel Defense Resource Center (as cited in Kaufman, 1993) noted:

> Retraction as opposed to most other aspects of defamation law that have been judicially developed, has a history of legislative treatment.... The scope of protections afforded in (retraction) statutes to plaintiffs and defendants varies greatly; and, unfortunately, many of those statutes, often for lack of legislative updating to reflect modern constitutional developments, are currently ineffectual or 'obsolete.' To the extent that (the proposed retraction provisions of the Defamation Act) would serve to update, and make more consistent in treatment, matters traditionally considered appropriate subjects for legislation, (they) could be viewed as making a contribution in this area. (p. xvii)

Despite the Libel Defense Resource Center's sentiments, for more than three years the retraction provisions lay largely unnoticed and unchanged as the comprehensive Defamation Act was challenged by media groups and was met with what Kaufman called a "deafening silence" from plaintiffs and their representatives--"the very groups whom its most controversial features were intended to benefit" (p. xviii).

The Uniform Law Commissioners Drafting Committee withdrew the Defamation Act from consideration for several months in hopes of gathering some support for the Act at an "open hearing" scheduled in October 1992. Significant support for the comprehensive Act failed to materialize at the October hearing (Kaufman, 1993), and the Uniform Defamation Act met with "vitriolic opposition from the newspaper industry" (Gersh, 1993, p. 11). Commenting on the Drafting Committee's goal of securing a measure of vindication for libel plaintiffs, one witness at the hearing, Chad Milton, general counsel of Media/Professional Insurance Inc., an insurer of large and small media organizations, observed that the Uniform Law Commissioners could achieve 90 percent of the vindication it sought, with 10 percent of the dislocation and strife, simply by means of bolstering the mechanisms of retraction already included in the Defamation Act. Thus, as Kaufman noted, at the "very moment that the death knell was sounding for the Defamation Act as a whole, a means of salvaging an important piece of the Uniform Law Commissioners' work had presented itself" (1993, p. xviii).

Although events over the next several months followed a somewhat circuitous path, the comprehensive Defamation Act was ultimately withdrawn, paving the way for the substitution of a free-standing Uniform Correction or Clarification of Defamation Act. The revised Act takes into consideration a number of suggestions for improvement provided by groups working under the auspices of the American Bar Association, the Libel Defense Resource Center and other interested parties (Kaufman, 1993). It was approved on August 5, 1993, by the American Bar Association National Conference of Commissioners on Uniform State Laws in Charleston, SC, and was discussed and approved at the American Bar Association meeting in February 1994 (Winfield, 1993b). The Uniform Law Commissioners will now present the bill for passage by state legislatures (Hoberman, 1995).

Content.

The Libel Defense Resource Center, which monitored the Act through American Bar Association passage, concluded that the act's provisions were at least as good as, if not better than, those of existing state statutes (Winfield, 1993b). A brief summation of the Act (1994) follows:

1. The Act applies to all forms of publication, including written and oral publications, and to all publishers, including national and local media, and private individuals;

2. A request for correction or clarification is considered timely if made within the period of limitation for commencement of an action for defamation. However, a person who fails to make a good-faith attempt to request a correction or clarification within 90 days of publication knowledge may recover only provable economic loss;

3. A person asked to disseminate a correction or clarification may request disclosure of "reasonably available" information which would help establish the falsity of the allegedly defamatory statement. A potential plaintiff who fails to disclose the information after a request to do so is made, may recover only provable economic loss;

4. A correction or clarification is considered timely if it is published within 25 days after the receipt of disclosed information or within 45 days after receipt of a request for correction or clarification;

5. A plaintiff who does not make a timely request, or whose correction is timely and reaches substantially the same audience as the original defamatory item, may recover only provable economic loss, as mitigated by the correction or clarification;

6. If a timely correction or clarification is no longer possible, the publisher of an alleged defamatory statement can make a written offer to a. publish a sufficient correction or clarification and b. pay the defamed person's reasonable expenses of litigation, including attorney's fees, incurred before publication of the correction or clarification. Acceptance of the newspaper manager's written offer bars or, if an action

has commenced, terminates an action for defamation against the publisher. A person refusing to accept a correction or clarification offered under this section may recover only provable economic loss and reasonable expenses of litigation, including attorney's fees incurred before the offer.

Comparison to Tennessee statute.

The Uniform Correction or Clarification of Defamation Act has some positive features for potential libel defendants when compared to the current Tennessee statute. Unlike the current Tennessee statute, the Uniform Correction or Clarification of Defamation Act pertains to all media, not just newspapers and periodicals. Also, the uniform Act specifies that a potential libel plaintiff has 90 days after learning of the libel to ask the newspaper to publish a correction or clarification. Currently in Tennessee, a potential libel plaintiff can conceivably wait until five days before the statute of limitations runs before notifying the potential defendant of an impending libel suit. The statute of limitation for libel in Tennessee is one year after the "cause of action accrued" (Tennessee Code Annotated, 1980). Additionally, instead of having the current 10 days after notification of an imminent lawsuit to correct or clarify, Tennessee managers operating under the uniform law would have 45 days. Managers who fail to respond within 45 days would still avoid loss-of-reputation and punitive damages by publishing a sufficient correction or clarification.

The problem.

Although, according to Hite (1994, p. 3), the Uniform Correction or Clarification of Defamation Act is designed to "encourage the correction or clarification of a defamation where it is appropriate to do so," the two escape routes to elude a costly libel suit might prove appealing for managers who would rather run a retraction on a possibly libelous/possibly truthful story than face punitive or loss-of-reputation damages. As Ackerman (1994) suggests:

> To publishers, the ability to eliminate general and punitive damages or even terminate litigation upon publication of a correction or clarification might pose too great a temptation. This may be particularly true in those organizations in which economic decisions made in the boardroom compromise editorial decisions made at the city desk. The continued availability of punitive damages in the absence of correction or clarification exacerbates the temptation to take the inexpensive, if unprincipled way out. (p. 51)

The Clash: Ethics v. Finances

Journalistic ethics defined.

At least three societies for professional journalists provide guidelines for ethical behavior: the American Society of Newspapers Editors Statement of Principles (1975), the Associated Press Managing Editors Association Code of Ethics (1975), and the Society of Professional Journalists Code of Ethics (1973). Each code contains a statement describing the responsibility of a newspaper to uphold truth and to ensure a free marketplace of ideas. For example, the Society of Professional Journalists (1973) code states the following under the subheading of "responsibility": "The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare."

Although there have been several studies which show that codes of ethics are far removed from everyday practices (Bellah et. al., 1985; Ettema & Glasser, 1985; Evans, 1993), there are many scholars who believe the "public's right to know," born out of the social responsibility theory, is and should be used by newspapers as a guiding principle (Johnstone et al., 1976; Klaidman & Beauchamp, 1987; Siebert et al., 1956). For these scholars and for this research, an ethical newspaper or newspaper manager is defined as one which ensures that truth and the "public's right to know" is upheld.

Finances.

Newspapers are not merely providers of "all the news that's fit to print," however. Newspapers are a business as well. They have a responsibility to make a profit for investors. As McManus suggested in his book, Market Driven Journalism (1994), "In most newsrooms there are two sets of 'oughts,' those of journalism--representing the interests of citizens; and those of business--representing the interests of investors. These govern the exchanges with parties outside the news department" (p. 24).

Newspapers' dual roles may have an impact on the type of stories which are published. McManus, after studying of three Los Angeles-area television stations' news departments, put forth a "market theory of news production," which states "the probability of an event/issue becoming news is inversely proportional to the cost of the reporting it" (p. 87). Other studies also point to the trend of more concern for profits. A study of West Coast journalists from 12 daily newspapers by Underwood and Stamm (1992), for instance, confirmed what newspaper industry analysts (e.g., Bagdikian, 1985; Kwitney, 1990) have already noted: newspapers are becoming more reader-oriented and market driven. The journalists surveyed by Underwood and Stamm at four different types of dailies--small family, small chain, large family, and large chain--reported that most recent policy changes fall into the "business oriented" category (p. 314). Underwood and Stamm further noted that "staffers perceive a reduced emphasis on journalistic principles when management's concern with profits is brought into the newsroom" (p. 309). Perhaps this negativity is, as Reisinger (1983) suggests, due to a perception that as managers become more profit-oriented less solid, hard-hitting reporting is published. In his research about news rescues, Vergobbi (1992), citing studies by Altschull in 1984, Argyris in 1974, and Bagdikian in 1987, said "sometimes a news organization withholds information for reasons other than news judgment, such as libel chill, to protect its public image....Outside pressure develops from intertwined business or political connections" (p. 233).

On an individual level, studies have shown that when money and finances enter the picture, ethics often exit. In a sample of 2,000 men and women in business and finance, for example, Briles (1991) found that of the 347 responding that money was a primary motivator for unethical behavior for both men and women. Similar findings were reported by Mauro (1987) in an ethnographic study of 21 participants employed by a multi-billion dollar, telecommunications computer corporation. Mauro concluded that "money is an extremely important factor that influences a manager's ethics in decision making" (p. i). In the field of journalism, money as a problem in ethical decision making has also come to the forefront. In fact, an ethics committee report of Associated Press Managing Editors (1990) asked 34 media leaders and academics what they perceived as the greatest ethical problem of the 1990s. Nine of the participants cited some form of business or economic pressure, which the committee chair characterized as a relatively new trend.

Whether the Uniform Correction or Clarification of Defamation Act will undermine such ethical principles as truth-telling and the public's right to know due to financial considerations has not been studied previously. In fact, because very little research has been conducted on retractions and none has been done on the Uniform Correction Act, this research is designed to answer two questions:

1. What factors contribute to a decision to run a retraction?
2. What impact, if any, may some of the provisions in the Uniform Correction or Clarification of Defamation Act have on a decision to run a retraction?

Methods and Procedures

Survey Population

The survey population consisted of editors, managing editors, or other newspaper personnel who are directly responsible for their newspaper's news content and, therefore, are the key people in retraction decisions. Management personnel at each of the 136 daily and non-daily newspapers listed in Tennessee Press Association's 1994 Tennessee Newspaper Directory were potential respondents. This population was selected because it is the same one used by Bowles and Marcum (1990) in their research concerning libel chill. Also, the newspapers listed in the directory are members of the Tennessee Press Association, the largest and oldest media advocacy group in Tennessee.

The Survey

The initial survey instrument for this study was devised in late June 1994 following Dillman's Total Design Method (1978). In order to simulate as well as possible the actual decision-making process which occurs in the newsroom by management, the survey contained two newspaper stories taken directly from libel suits litigated in Tennessee courts (Kirk v. The Commercial Appeal, 1988, and Memphis Publishing Co. v. Nichols, 1978). The story for which the Kirk suit was filed was selected because it involved a public figure and the information for the story came from eyewitnesses. The Nichols case was chosen because it dealt with private citizens and the information for the story came from police reports. Cases for the scenarios were purposefully chosen to ascertain if the presence of the actual malice standard has an impact on retraction decisions made, since actual malice would apply to the Kirk case and not to the Nichols case. Both of the stories, with people and place names changed, served as scenarios for the survey. A series of a identical questions followed each scenario to determine when editors would support or retract the story under current law and under the proposed Uniform Correction or Clarification of Defamation Act (dependent variables).

Since the study dealt with retraction, one of the symptoms of the libel "chilling effect," many of the survey questions were based directly or indirectly on ones used by Anderson and Murdock (1981), Hansen and Moore (1989), and Bowles and Marcum (1990). Other questions were written to determine if reporter experience, manager ethics, and newspaper finances predicted when a story was retracted or supported. Other independent variables included the following: 1. use of libel insurance, 2. attorney pre-publication review of stories, 3. advice seeking from the Tennessee Press Association or another media advocacy group, 4. times threatened with libel suits, 5. times sued for libel, 6. newspaper circulation, 7. frequency of publication, 8. type of newspaper ownership, 9. respondent's job title at newspaper, 10. respondent's duration in current job title, and 11. respondent's employment time at the newspaper.

The original survey was pre-tested July 6-8, 1994 on nine members of a daily newspaper and one manager from a weekly. These subjects were most representative of the sample surveyed due to their newspaper responsibilities. Suggested changes were made after feedback from the pilot group.

Procedures

The 40-item, self-administered questionnaire was mailed on August 1, 1994, to each of the 136 Tennessee newspapers listed in the Tennessee Newspaper Directory, along with a cover letter and self-addressed, stamped return envelope. The cover letter directed that the questionnaire be completed by the editor, managing editor, or the person most directly responsible for the news operation of the paper. Respondents were guaranteed confidentiality. A follow-up postcard was mailed on August 10, 1994. Sixty-two questionnaires (rate = 45.5%) were returned by the August 29, 1994, deadline.

Of those responding, 25.8% work at daily newspapers and 74.2% are employed at non-dailies. Fifty percent work for newspapers with a paid circulation between 5,000 and 14,999. Twenty-nine percent are employed at newspapers with circulations less than 5,000. Twenty-one percent are managers at newspapers with circulations 15,000 or more.

The type of newspaper ownership broke down as follows: 46.8% of respondents work at individual or family-owned newspapers; 19.4% are employed by local corporation-owned newspapers; 14.5% are at newspapers owned by regional media chains; and 19.4% work at newspapers owned by a national media chain.

All of the respondents are either editors (rate = 50%), managing editors (rate = 17.7%), or newspaper managers with other job titles (rate = 32.3%) who are responsible for news content. Twelve of the 20 (rate = 60%) respondents who answered "other" for job title are publishers. Respondents who have had their current job titles for more than 10 years numbered 46.8%. Those who have had their current job title from 0-5 years numbered 38.7%. The remainder of the respondents, 14.5%, have had the same job title for 6-10 years.

Time employed at the newspaper was answered as follows: 54.8% have been employed with their current newspaper for more than 10 years; 21% have been with the newspaper for 6-10 years; and 24.2% have been employed with their current newspaper for 0-5 years.

A comparison of the sample demographics to the known survey population demographics showed consistency between the sample and the population, which adds confidence that the results are an accurate representation of the population.

Survey question No. 31, an open-ended ethics question regarding retractions, was coded based on a content-analysis of responses. Responses which state that running a retraction is unethical if the story is truthful were put into one category. Responses which did not contain the word "truthful" were coded into a different category, as were no responses and "don't know." To insure intracoder reliability, the way the data was coded was triple-checked over a two-day period.

Results

Question No. 1

Because this study deals with retraction--a side effect of libel chill--and in order to answer research question No. 1, a reliability analysis of the eight-item chilling effect scale was conducted (Cronbach's alpha = .70). The minimum level for the alpha coefficient is .70 (Miller, 1964) and tells if a scale is internally consistent. A factor analysis of the chill scale extracted three factors. Using a rotated factor matrix, four of the chill scale questions loaded on Factor 1. The alpha for the new, four-item chill scale is .68. Because reliability is questionable with both scales, the chill scale score was discarded as an independent variable.

A factor analysis was performed on all the variables relating to the survey instrument's first and second scenarios to see if respondents viewed the newspaper stories as being different or the same. All of the questions pertaining to scenario No. 1, concerning the private citizen, loaded on Factor 1. The questions for scenario No. 2, concerning the public figure, loaded on Factor 2. Respondents treated the scenarios as being different. Additionally, when a correlation coefficient was calculated, the retraction variables for the two scenarios were not related (r = .13).

Separate retraction indexes for both scenarios were created using the retraction, loss of reputation, and punitive damages questions as the additive measure. Respondents who are most likely to retract a story would score 15. The retraction indexes have face validity because the questions from which they were constructed deal with retractions under current Tennessee law. The two retraction indexes became the two dependent variables for research question No. 1.

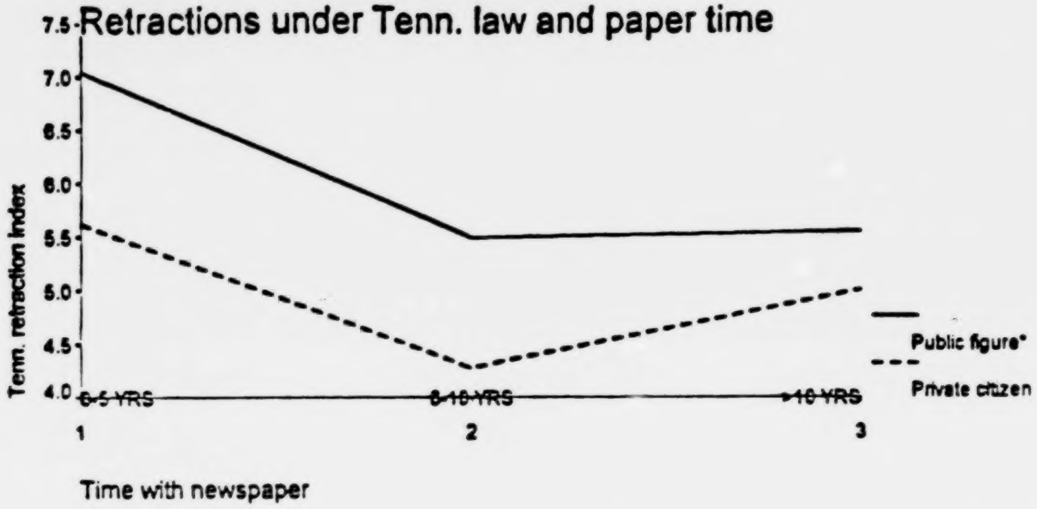
Utilizing the Pearson product-moment correlation, correlation coefficients were calculated between the two dependent variables and the independent variables. Only one correlation was significant, that between the retraction index for the public figure scenario and the respondent's employment time at the newspaper ($r = -.29$). A simple factorial one-way ANOVA was performed on the data, with respondent's employment time at the newspaper as the independent variable and the retraction index for the public figure scenario as the dependent variable. Employment time at the newspaper was significantly related to retraction of the public figure story ($F_{2,60} = 3.67$; $p < .05$). Editors or managing editors who have been with the newspaper for the least amount of time (0-5 years) are more likely to retract than those who have been with the newspaper for 6-10 years or for more than 10 years (see Figure 1). Employment time at the newspaper was not significantly related to retraction of the private citizen story.

Question No. 2

In order to test research question No. 2, separate Uniform Correction or Clarification of Defamation Act (UCCDA) retraction indexes for both scenarios were created using the 45 days to publish a retraction and the bar or terminate action for defamation questions as an additive measure. Respondents who are most likely to retract, therefore, would score 10 on the additive measure. The created indexes have face validity because the questions from which they were constructed deal with two of the provisions afforded in the Uniform Correction or Clarification of Defamation Act. Although running a retraction to clear the newspaper of punitive damages and running a retraction to clear the newspaper of loss of reputation damages are also provided for under the uniform Act, the 45 days to publish a retraction and the bar or terminate action for defamation questions are clearly different from current Tennessee law. The two UCCDA retraction indexes became the two dependent variables for research question No. 2.

Figure 1. Comparison of means

Retractions under Tenn. law and paper time



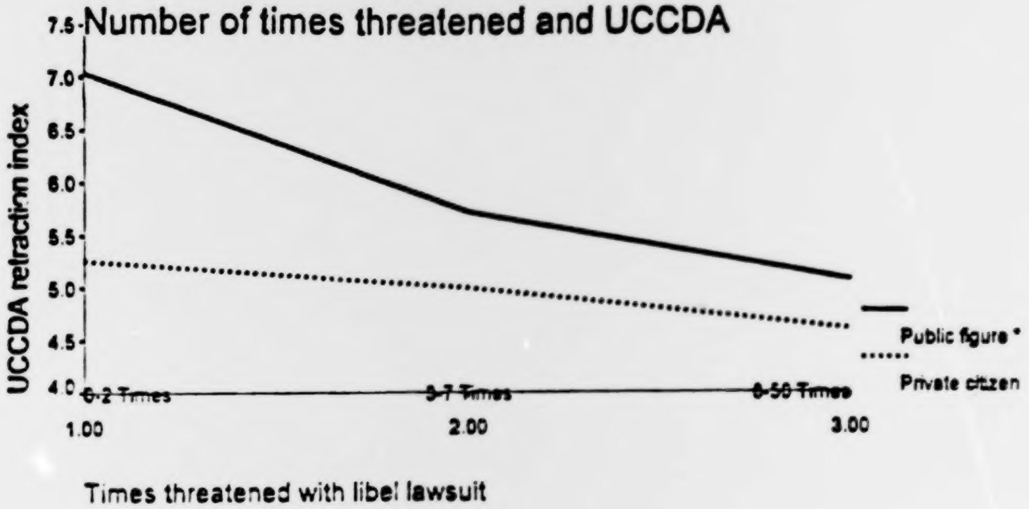
* $p<.05$

Correlation coefficients were calculated using the Pearson product-moment correlation between the two dependent variables--the UCCDA retraction indexes for the public figure and private citizen--and the independent variables. Three correlations were significant:

1. The UCCDA index for the public figure scenario and the number of times the respondent's newspaper had been threatened with a libel suit during the past five years was significantly negatively correlated (r = -.41). An analysis of covariance was performed on the data after the responses to the threat question were divided into three categories based on mean percentile values. The UCCDA index for the public figure scenario was the dependent variable; the number of libel suit threats was the independent variable; and the public figure retraction index for Tennessee law was the covariant. The number of libel suit threats was significantly related to retraction of the public figure story under the uniform Act ($F_{2,60} = 5.3$; $p<.01$). Editors or managing editors who manage newspapers which have been threatened with libel suits the most (8 to 50 times) in the past five years are less likely to run a retraction under the uniform Act than managers of newspapers which have been threatened 0-2 times or 3-7 times (see Figure 2).

2. Positively correlated (r = .52) with the UCCDA retraction index for the private citizen scenario was the uniform Act ethics question (No. 24). A one-way simple factorial ANOVA was performed after the response categories for the ethics question were compressed. Responses 1 (very unlikely) and 2 (unlikely) became 1. Response 3 (no opinion/don't know) became 2. Responses 4 (likely) and 5 (very likely) became 3. The variables were found to be significantly related ($F_{2,60} = 9.199$; $p<.001$), such that a significant number of respondents who had said they would retract the story under the UCCDA conditions were still willing to retract even if they knew the story was true and the reporter acted appropriately (see Figure 3).

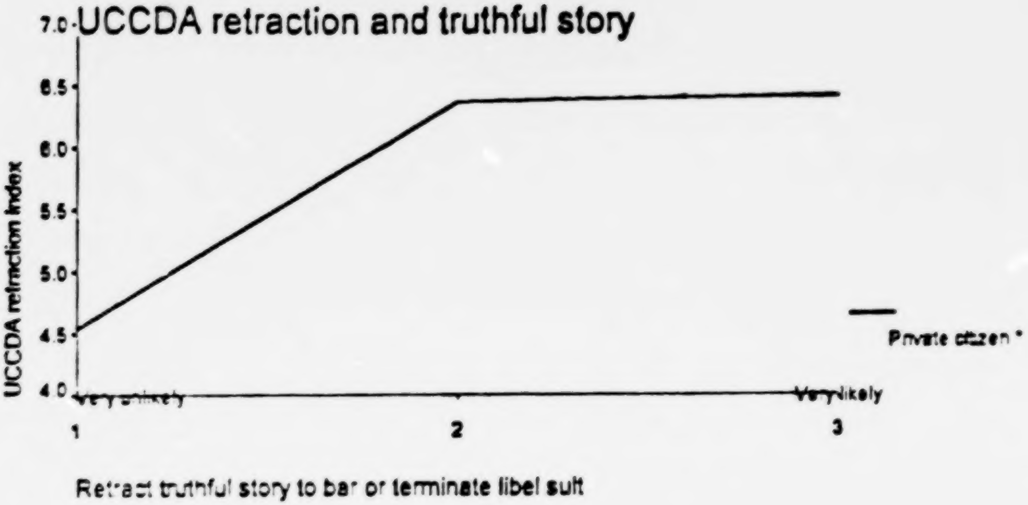
Figure 2. Comparison of means



* p<.01

Figure 3. Comparison of means

UCCDA retraction and truthful story



* $p < .001$

3. The uniform Act ethics variable (question No. 16) was also positively correlated with the UCCDA retraction index for the public figure ($\underline{r}$ = .30) after the response categories were similarly compressed. The variables were not significantly related when a simple factorial, one-way ANOVA was performed on the data, however.

To further answer question No. 2, a comparison of means of the current law and UCCDA indexes was conducted to see what overall impact the Uniform Correction or Clarification of Defamation Act may have on a decision to run a retraction. The 15-point current law retraction indexes were transformed by multiplying by two-thirds to equate them with the 10-point UCCDA indexes. Paired-sample t-tests did not show a significant difference between the means of the two public figure retraction indexes ($\underline{t}_{60}$ = -1.04; p>.05) or the two private citizen retraction indexes ($\underline{t}_{59}$ = .00; $\underline{p}$>.05). The public figure UCCDA retraction index had a greater overall mean (M = 6.07, SD = 1.93) than the Tennessee law public figure retraction index (M = 5.89, SD = 1.90). The same was true with the private citizen indexes. The private citizen UCCDA retraction index had a greater overall mean (M = 5.08, SD = 1.91) than the Tennessee law private citizen retraction index (M = 5.0, SD = 1.96).

Since the tendency to retract under the uniform Act is slightly greater than under the current Tennessee law, a comparison of means was conducted between the two public figure retraction indexes and the independent variables, and between the two private citizen retraction indexes and the independent variables. These comparisons were executed in order to better determine under what circumstances retractions increase with the UCCDA.

For the public figure scenario, the overall means increased under the UCCDA index with each of the 15 independent variables compared (see Table 1). The overall means for each of the 15 independent variables compared also increased under the UCCDA retraction index for the private citizen story (see Table 2).

Table 1

Comparison of Overall Means Between Independent Variables and Retraction of Public Figure Story Under Current Tennessee Law and the UCCDA

Independent Variable:	Public figure under current Tennessee law	Public figure under UCCDA
1. Libel Insurance	5.89	6.06
2. Pre-Publication Review	5.89	6.06
3. Seeking TPA Advice	5.89	6.06
4. Libel Threat	5.89	6.06
5. Sued for Libel	5.89	6.05
6. Newspaper Circulation	5.89	6.06
7. Frequency of Newspaper Publication	5.89	6.06
8. Type of Newspaper Ownership	5.89	6.06
9. Job Title	5.89	6.06
10. Job Title Time	5.89	6.06
11. Time with Newspaper	5.89	6.06
12. Reporter's Professional Experience	5.89	6.06
13. Newspaper Financial Soundness	5.90	6.06
14. Profit as Mission	5.89	6.03
15. Answer to Ethic Question No. 31	5.89	6.06

Table 2

Comparison of Overall Means Between Independent Variables and Retraction of Private Citizen Story Under Current Tennessee Law and the UCCDA

Independent Variable:	Private citizen under current Tennessee law	Private citizen under UCCDA
1. Libel Insurance	5.00	5.08
2. Pre-Publication Review	5.00	5.08
3. Seeking TPA Advice	5.00	5.08
4. Libel Threat	5.00	5.08
5. Sued for Libel	4.92	5.05
6. Newspaper Circulation	5.00	5.08
7. Frequency of Newspaper Publication	5.00	5.08
8. Type of Newspaper Ownership	5.00	5.08
9. Job Title	5.00	5.08
10. Job Title Time	5.00	5.08
11. Time With Newspaper	5.00	5.08
12. Reporter's Professional Experience	5.00	5.08
13. Newspaper Financial Soundness	4.98	5.06
14. Profit As Mission	4.93	5.01
15. Answer to Ethic Question No. 31	5.00	5.08

To further determine if the UCCDA provisions will impact retraction decisions, a case-by-case analysis of the differences between the Tennessee and UCCDA provisions for both scenarios was conducted. UCCDA provisions for both scenarios influenced 25.8% of respondents in their decision to retract by +/- 2 or more out of a possible 10. More tests could not be performed on this sample, however, due to its limited size.

Discussion

Summary of Results

This research suggests retractions will increase under the Uniform Correction and Clarification of Defamation Act. For one-quarter of survey respondents, the UCCDA provisions made a difference in the way they responded to potentially libelous stories. The tendency to retract, as indicated by the overall means of each of the 15 variables, was greater when paired with the two UCCDA indexes than when paired with the two Tennessee law retraction indexes. In other words, 32 out of 32 times the overall means increased under the UCCDA provisions.

Because the increases under the UCCDA were slight, however, only two variables were statistically significant: 1. The likelihood to run a retraction on the public figure story significantly decreased when the libel threats increased and 2. Editors were significantly more willing to retract the private citizen story to bar or terminate a lawsuit even if they knew it was truthful and the reporter acted appropriately. Running a retraction on a truthful story was not linked, however, to the perceived financial status of the respondent's newspaper or to the public figure scenario.

Under current Tennessee law and in response to question No. 1, the amount of time a newspaper manager has been employed at a newspaper significantly impacts a decision to retract a story under current Tennessee law. Those managers who have been with the newspaper the least amount of time are more willing to retract a story about a public figure.

Explanation

The respondents clearly treated the survey instrument's private citizen and public figure scenarios differently. Were they reacting to the sources for the stories or were they reacting to the subjects in the stories? The latter is more easily argued. Although the majority of respondents said it was likely or very likely that the reporter's experience would affect their decision to run a retraction, reporter's experience was not related significantly to any other variable in the study. Each of the significant findings in this research can be linked, however, to the way public figures and private citizens are treated in the courtroom when they sue for libel.

In Tennessee, as in most states, private citizens and public figures are treated differently when they become plaintiffs in a libel suit (King & Ballow, 1988). A public figure's burden of proof is that of "convincing clarity." The private citizen's is a "preponderance of the evidence." Perhaps the most important difference is the standard of fault required. A public figure has to prove actual malice, that is, knowing falsity or reckless disregard for truth or falsity. A private citizen only has to prove "ordinary negligence," that is, whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the statement (King & Ballow, p. 36). A newspaper is, therefore, far more protected against the award of damages in libel suits involving public figure plaintiffs.

The actual malice standard, coupled with the fact that many more stories and thus many more complaints come from public persons, would help explain why an increase in threats would actually decrease the likelihood of retraction under the study's public figure scenario. It could also be used to explain why editors who have been with the newspaper the least amount of time are more likely to retract the public figure story. If an editor is not familiar with the community and the community leaders, then judging whether a threat should be taken seriously becomes more difficult. Again, because more stories are written about public figures, more complaints come from those people.

McGuire and Papageorgis' inoculation theory (1961), typically applied to research about persuasive messages, could also explain why less experienced editors are more likely to retract due to threats. Inoculation theory is best described by comparing it to the situation one would find in the medical field. If a person is brought up in a germ-free environment and is exposed to germs, they are more susceptible to disease. One of the ways to build resistance is through deliberate exposure to a weakened form of the germ that stimulates the defenses. Editors who have been with the newspaper for shortest amount of time have not built up an immunity to public figures' threats, which could be considered persuasive in nature. They are "weaker" than their peers who have been with the newspaper for a longer period of time.

The actual malice standard may help explain why newspaper managers were more willing to retract a truthful story about a private citizen than one concerning a public figure. Why endure a long, potentially expensive, and more easily lost libel lawsuit with a private citizen when a retraction will make it all go away? The findings regarding this provision of the uniform Act appear to confirm Ackerman's (1994) prediction that some conditions of the UCCDA "might pose too great a temptation" (p. 51) to retract for reasons other than fault. The public's right to know information about private citizens may be undermined if the UCCDA is adopted.

Limitations

A question that invariably arises in this type of research is one of generalizability. Will editors respond to an actual change in the retraction statute in the same way that they responded to hypothetical questions in a survey? Can editors be expected to know in advance how they would respond in the event the retraction statute was actually to change?

Mail surveys also result in self-selected samples. Editors chose whether they wished to respond and be included as part of the sample. Does the self-selection process itself introduce bias? For example, with the libel chill scale questions, editors who are particularly fearful of a libel suit may be more inclined to respond and therefore exaggerate the chilling effect. Other editors may wish to minimize it by not responding at all or by responding untruthfully. Thus, to the extent that the editors may not accurately reveal their preferences, two biases may be present. These biases are, at least to some extent, mutually offsetting.

Recommendations

The results of this study point to several opportunities for future research in an area which appears to be based on law-induced situational ethics. It would be interesting to see a similar type of study about the potential impact of the Uniform Correction or Clarification of Defamation Act conducted in a state where the current retraction statute does not have specified (or has minimal) notification and publication time limits. Also, Tennessee's retraction statute and common law protects newspapers and their managers from most forms of monetary damages, including punitive. Would the results of a similar type of survey be the same if it was conducted in a state where punitive damages are still offered to plaintiffs?

Additional research on newspaper retraction policies is needed to address more clearly the distinctions made between private citizens and public figures during the course of this study. Questions dealing with threat of libel suit, for example, should ask the number of threats made from public figures, public officials, and private individuals and see what effect that has on retraction of stories about public figures, public officials, and private individuals. Questions pertaining to the number of libel suits filed against a newspaper should be similarly divided to see if this has an effect on a willingness to retract. Is the actual malice distinction as important as it appears to be?

More research into the ethical aspects of retraction is also indicated. The majority of editors clearly understand that retracting a truthful story is unethical, as demonstrated by their answers to question No. 31. The respondents became more lax in their ethical standards when answering ethical questions of a more practical nature (Nos. 16 and 24). This appears to confirm the findings of some researchers (Bellah et al. 1985; Ettema & Glassner, 1985; Evans, 1993) and should be explored further.

Future research also needs to examine more thoroughly the libel chill scale. Because its reliability is questionable, more research is indicated. If the scale can be reduced from eight items to four and only lose .02 reliability, perhaps other items should be added to the scale and statistically tested.

References

Ackerman, R. M. (1994). Bringing coherence to defamation law through uniform legislation: The search for an elegant solution. 72 N.C.L. Rev. 291.

Allen v. Pioneer Press Co., 40 Minn. 117, 41 N.W. 936, 3 L.R.A. 532, 12 Am. St. Rep. 707 (1889).

American Society of Newspaper Editors. (1975). Statement of principles. Reston, VA: Author.

Anderson, D. A., & Murdock, M. (1981). Effects of communication law decisions on daily newspaper editors. Journalism Quarterly, 58, 525-528.

Associated Press Managing Editors Association. (1975). Code of ethics. New York: Author.

Associated Press Managing Editors. (1990). Newspaper ethics. New York: Author.

Bagdikian, B. (1985, summer). The U.S. media: Supermarket or assembly line? Journalism Communication, 35, 97-109.

Bellah, R. N., Madsen, R., Sullivan, W. M., Swidler, A., & Tipton, S. M. (1985). Habits of the heart. New York: Harper & Row.

Bowles, D., & Marcum, H. (1990, August). The chilling effect of libel on newspaper editors. Paper presented to the Association for Education in Journalism and Mass Communication, Minneapolis, MN.

Briles, J. (1991). Women and ethics in business. Unpublished doctoral dissertation. Nova University.

Davidson v. Rogers, 281 Or. 219, 574 P.2d 624 (1978).

Dillman, D. A., Christenson, J. A., Carpenter, E. H., & Brooks, R. M. (1974). Increasing mail questionnaire response: A four state comparison. American Sociological Review, 39, 744-756.

Ettema, J., & Glasser, T. (1985). On the epistemology of investigative journalism. Communication, 8, 183-206.

Evans, D. (1993). Ethical decisions: An analysis of the stories journalists tell. Unpublished doctoral dissertation, University of Utah.

Garneau, G. (1994, March 19). Libel threat dips. Editor & Publisher, p. 29.

Gersh, D. (1993, July 3). Uniform corrections. Editor & Publisher, p. 11.

Gertz v. Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Hansen, E. K., & Moore, R. L. (1989, August). Chilling the messenger: The impact of libel on community newspapers. Paper presented to the Association for Education in Journalism and Mass Communication, Washington, D.C.

Hermanson, L. W. (1992). Setting the record straight. Journalism Monographs, 133.

Hite, R. C. (1994, February). Uniform Correction or Clarification of Defamation Act report to the American Bar Association House of Delegates.

Hoberman, H. (1995, March). Libel reform isn't necessarily bad for nation's media. Quill, p. 14.

Johnstone, J. W. C., Slawski, E. J., & Bowman, W. W. (1976). The news people: A sociological portrait of American journalists and their work. Urbana: University of Illinois Press.

Kaufman, H. R. (1993). Special report: The potential reform of state retraction law under the Uniform Correction or Clarification of Defamation Act. New York: Libel Defense Resource Center.

King & Ballow Attorneys at Law. (1988). The media and the first amendment in Tennessee. Nashville, TN: Author.

Kirk v. The Commercial Appeal, 1988 Tenn. App. LEXIS 292.

Klaidman, S., & Beauchamp, B. L. (1987). The virtuous journalist. New York: Greenwood Press.

Kwitny, J. (1990, June). The high cost of high profits. Washington Journalism Review, pp. 19-29.

Langford v. Vanderbilt University, 199 Tenn. 389; 287 S.W.2d 32 (1956).

Madison v. Yunker, 589 P.2d 126 (1978).

Massing, M. (1985, May-June). The libel chill: How cold is it out there? Columbia Journalism Review, pp. 31-43.

Mauro, N.J. (1987). Business ethics, managerial decision-making and corporate culture and values. Unpublished doctoral dissertation, New York University.

McGuire, W., & Papageorgis, D. (1961). The relative efficacy of various types of prior belief-defense in producing immunity against persuasion. Journal of Abnormal and Social Psychology, 62, 327-337.

McManus, J. H. (1994). Market-driven journalism: Let the citizen beware? Thousand Oaks, CA: Sage Publications, Inc.

Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 4 Med.L.Rptr. 1573; (Tenn. 1978).

Miller, D. C. (1964). Handbook of research design and social measurement. New York: David McKay Co., Inc.

Montana Code Ann. 64-207.1 (1947).

National Conference of Commissioners on Uniform State Laws. (1994, January). Uniform Correction or Clarification of Defamation Act. Chicago: Author.

New York Times Co. v. Sullivan, 376 U.S. 454, 84 S.Ct. 710, 11 L.Ed.2d 686, 1 Med.L.Rptr. 1527 (1964).

Reisinger, S. (1983, Oct 31-Nov. 4). Massive libel suits threaten freedom of all newspapers. Associated Press Managing Editors freedom of information report issued at annual convention of APME, Louisville, KY.

Siebert, F., Peterson, T., & Schramm, W. (1956). Four theories of the press. Urbana: University of Illinois Press, Ch. 3.

Society of Professional Journalists (1973). Code of ethics. Chicago: Author.

Tennessee Code Ann. 28-3-104 (1980).

Tennessee Newspaper Directory (1994). Knoxville, TN: Tennessee Press Service, Inc.

Tennessee Retraction Statute, Tenn. Code Ann. 29-24-103 (1993).

Underwood, D. & Stamm, K. (1992). Balancing business with journalism: Newsroom policies at 12 west coast newspapers. Journalism Quarterly, 69(2), 301-317.

Vergobbi, D. J. (1992). Journalists as source: The moral dilemma of news rescue. Journal of Mass Media Ethics, 7 (4), 233-245.

Werner v. Southern Cal. Associated Newspapers, 216 P.2d 825, 828-35 (1950), appeal dismissed, 340 U.S. 910, 71 S.Ct. 290, 95 L. Ed. 657 (1951).

Winfield, R. N. (1993, July 24). Correcting errors may equal reducing damages. Editor & Publisher, p. 5.

Winfield, R. N. (1993, September 25). Uniform Correction Act moving closer to reality. Editor & Publisher, p. 3.

Who Belongs to the Privileged Class?
Journalistic Privilege for Non-Traditional Journalists

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Paper Submitted to the Law Division
AEJMC National Convention - Washington, DC
August 9-11, 1995

Who Belongs to the Privileged Class?
Journalistic Privilege for Non-Traditional Journalists

While a reporter for a city newspaper, you cover a murder in which two men are separately convicted of the same crime. You decide to pursue the story on your own time and make a book out of it. One of the men convicted seeks a new trial and subpoenas you and the extensive material you have collected, including quite a bit that was acquired under promise of confidentiality. Can you claim journalistic privilege to avoid being jailed for contempt of court if you do not comply with the subpoena?

The question arose in precisely that form recently in Louisiana in a case concerning Joseph Bosco, reporter and author of *Blood Will Tell*. In January of this year, a Louisiana appeals court upheld Bosco's claim that he was entitled to claim journalistic privilege, and the Louisiana Supreme Court let the decision stand.[1]

Would other states have accorded a book author the same protection? Some already have, but some have not. What about a documentary filmmaker or a free-lancer collecting information for an on-line electronic newservice? Can they claim the same privilege a "regular" newspaper reporter has?

At issue is not simply who is included in the definition of "press" but also who is a "qualified" participant in the critical free flow of information to the public and therefore entitled to preserve confidentiality. Many of the cases involving claims of privilege since *Branzburg v. Hayes*[2]-- whether under shield laws or the First Amendment -- have typically *begun* with a determination of whether the claimant has standing to assert privilege (as a "journalist" or "newsgatherer," for example) and only *then* has the merit of the claim been evaluated. The purpose of this paper is to examine who beyond those traditionally considered journalists has been afforded or denied shield protection in the courts as well as under state shield laws, and on what basis the determination was made.

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[1] State v. Fontanille, 93-KH-935, 1994 WL 25830 (La. Ct. App. Jan. 24, 1994), *cert denied*, KK 0247 (La. Sup. Ct. Feb. 25, 1994).

[2] 408 U.S. 665, 92 S. Ct. 2646 (1972).

A Word on Definitions

The very need to offer an explanation on terminology demonstrates the problem. In the course of the following discussion, the phrase "non-traditional journalist" (or "non-traditional media") will be used to refer to those involved in newsgathering and dissemination of information who do not fit the "traditional" image of the newspaper reporter, editor, or columnist, or the broadcast analog, the television or radio reporter or newscaster.[3] Most frequently the newsgatherer involved has been a book author or a free-lancer, but not always; and the issues involved are extendable to anyone who undertakes a journalistic project through non-traditional means.

Background

In a political and economic system based on the free flow of information, those who collect and disseminate that information must have unfettered access to it. The information-gatherer's need to protect promises of confidentiality given to sources is grounded in the concern that a "chilling" or deterrent effect would result if sources had to fear identification and reprisal for providing information to the press (particularly where the government is concerned). Thus, newsgatherers have historically claimed it necessary to have the right not to divulge identities or information imparted to them in confidence. However, this right can come into direct conflict with a citizen's right to a fair trial and other interests as well in which the journalist's records or knowledge are potentially pertinent evidence.[4]

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[3] Although some state shield laws were enacted before the advent of broadcast media,extension of the laws' coverage to broadcast media personnel has generally met with little opposition. Indeed, shield laws drafted in the broadcast era include those media as a matter of course. 23 Charles Alan Wright and Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE §5426 (1980) . See also generally Virginia Grace Cook, SHIELD LAWS: A REPORT ON FREEDOM OF THE PRESS, PROTECTION OF NEWS SOURCES, AND THE OBLIGATION TO TESTIFY (1973).

[4] *See Branzburg*, 408 U.S. 665, 667 (1972). *See also* Maurice Van Gerpen, PRIVILEGED COMMUNICATION AND THE PRESS 150 (1979); and for general background on privilege also T. Barton Carter, Marc A. Franklin, and Jay B. Wright, THE FIRST AMENDMENT AND THE FOURTH ESTATE (1991); Donald M. Gillmor, Jerome A. Barron, Todd F. Simon and Herbert A. Terry, MASS COMMUNICATION LAW (1990); Harold L. Nelson and Dwight L. Teeter, LAW OF MASS COMMUNICATIONS (1991).

Before *Branzburg* in 1972, reporters sought protection from coerced revelation of confidential information (including sources' names) under statutes or under common law, or under a generalized but usually disappointed expectation of First Amendment protection. *Garland v. Torre*[5] in 1958 is generally considered the first case in which a court explicitly acknowledged the possibility of First Amendment protection for subpoenaed journalists, but the judgment went against the reporter involved. In addition, by the 1972 *Branzburg* decision, seventeen states, beginning with Maryland in 1896, had produced shield laws[6] explicitly protecting the press from coerced testimony -- albeit not unqualifiedly.[7] The late 1960s and early 1970s saw a proliferation of subpoenas arising out of an era of antiwar activity and general civil unrest, as well as increasing suspicion between politicians and polity.[8] The cumulative weight of the cases on the point led eventually to the combining of three exemplars into one brought before the Supreme Court in 1972.

Branzburg involved three reporters (two for newspapers, one for television) seeking constitutional protection from having to reveal information acquired with promises of confidentiality. A plurality of the U. S. Supreme Court ruled that "requiring newsmen to appear and testify before state or federal grand juries [does not] abridge the freedom of speech and press guaranteed by the First Amendment."[9] In effect, the right of a citizen to a fair trial and the judicial system's need for every man's evidence was seen to outweigh the journalistic need to protect sources. However, Justice Powell's concurrence still allowed for a potential, qualified privilege under the First Amendment,[10] and Justice

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[5] 259 F. 2d 545 (2d Cir. 1958).

[6] Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L. Rev. 1, 25 (1986).

[7] For background on shield laws see Monk *supra* note 6, at 17; for background on privilege generally, see Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 Wash. L. Rev. 739 (1994).

[8] Carter, Franklin and Wright, *supra* note 4, at 503; also Mark Neubauer, *The Newsman's Privilege After* Branzburg: *The Case for a Federal Shield Law*, 24 UCLA L. Rev. 160, 162 (1976).

[9] 408 U.S. 665, 667 (1972).

[10] *Id.* at 709 (Powell, J., concurring).

Stewart in his dissent suggested a three-part test [11] that a government should meet before denying journalistic privilege, while Justice Douglas held out for absolute, unqualified privilege.[12]

Given the room for interpretation left in the wake of *Branzburg*, members of the media and legal communities scrambled for surer means of securing protection of sources, or at least of predicting when it might or might not be exist. To date, twenty-nine states and the District of Columbia have shield laws. Of the remaining twenty-one states, journalistic privilege has been recognized in eleven by the state high courts on the basis of federal and/or state constitutional free press clauses. Five states have some common law recognition of the privilege; and five have either inconclusive case law or no case law at all.[13] None of the several federal statutes proposed along the way has ever been passed.[14]

A fundamental disagreement has emerged as to whether legislation provides better or worse protection of confidentiality than the qualified First Amendment protection many state and federal courts have recognized. Is the free flow of information better served by strong and explicit protective legislation, or does any legislation necessarily constitute a governmental abridgment of press freedom simply by imposition of qualifications, definitions, or restrictions? Some aspects of that disagreement are vividly illustrated in the following discussion of who should be included in the class of those eligible to claim journalistic privilege.

In his opinion for the plurality in *Branzburg*, Justice White sets the stage for the issues involved in deciding membership in that class:

> Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely

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[11] *Id.* at 743 (Stewart, J., dissenting).
[12] *Id.* at 714-15 (Douglas, J., dissenting).
[13] Survey as summarized in *Confidential Sources and Information*, NEWS MED. & LAW, Spring 1993.
[14] *See* Wright and Graham, *supra* note 3, for discussion, *passim* in notes, of some examples of proposed legislation in the early 1970s.

> pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." . . . The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[15]

Literature Review

Literature on state shield laws typically does not include extensive discussion of who is covered. With a few exceptions, reference to whether newsgatherers other than reporters are included is left to a paragraph or footnote merely raising the issue, usually to the effect that guidelines are inconsistent or nonexistent.[16] More thorough discussions of who is covered in state shield laws were those of Charles Wright and Kenneth Graham,[17] and Virginia Cook.[18]

Wright and Graham's survey was thematically organized, based on three elements: the nature of the medium, the relationship of the newsgatherer to the medium, and the content of the information. They posited a "core" image of the traditional reporter employed regularly by a large, established newspaper and progressed through theoretically possible variations on that image. Their main text was written at a time when a federal law was under consideration, and they frequently examined restrictions under consideration by proponents of such a statue. Two examples of such restrictions were the requirement that the medium involved manifest some "periodicity" and the need for the person involved to be a "professional disseminator."[19] Their study, though instructive on the potential issues involved, lacked systematic examination of the state laws, using them most often as footnoted examples of specific questions.

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[15] 408 U.S. at 704-705 (quoting *Lovell v. Griffin*, 303 U. S. 444, 450, 452 (1938)).

[16] Examples are Glenn A. Browne, *Just Between You and Me . . . for Now: Reexamining a Qualified Privilege for Reporters to Keep Sources Confidential in Grand Jury Proceedings*, 88 U. ILL. L. REV. 739 (1988); James C. Goodale, Joseph Moodhe, Lisa G. Markoff, and Rodner Ott, *Reporter's Privilege Cases* in Victor A. Kovner and E. Gabriel Perle, 2 BOOK PUBLISHING, 247 (1984); Joel M. Gora, THE RIGHTS OF REPORTERS: THE BASIC ACLU GUIDE TO A REPORTER'S RIGHTS (1974); Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law,* Branzburg v. Hayes, *and Recent Statutory Developments*, 25 ARIZ. L. REV. 865 (1983); Todd F. Simon, *Reporter Privilege: Can Nebraska Pass a Shield Law to Bind the Whole World*, 61 NEB. L. REV. 446 (1982); and Neubauer, *supra* note 8.

[17] Wright and Graham, *supra* note 3.

[18] Cook, *supra* note 3.

Cook's study was more specifically a comparative study of the wording of state shield laws, but it was written before the *Branzburg* decision and did not consider the question of non-traditional media, except for the peculiar inclusion of ex-reporters. It provided a three-element approach to analysis, similar to Wright and Graham's, involving: "(1) definitions of the relationship between the person protected and the various media: (2) listing the various media; and (3) a requirement in both the definitions and the listing that the employment relationship be 'regular' and the media 'legitimate.'"[20]

Carl Monk's 1986 study of the theory and statutes involved in journalistic privilege was perhaps the most learned, if theoretical, discussion of the issues involved.[21] While Monk did not address directly the question of non-traditional media, he did offer a brief but well-documented survey of terminology in state statutes concerning persons protected and types of media protected.[22] In examining the kinds of categories described in the statute terminology, he noted the technical difficulties in terminology like "regularly engaged"[23] or "general circulation."[24]

Many discussions of shield legislation are actually directed at efforts to devise a federal shield law, and they tend to divide into those advocating broader application of privilege and those seeking careful and even narrow definition of those eligible for the privilege. A number of the studies were done in the early 1970s when the combined effects of *Branzburg* and the Nixon administration's political strategies were felt to threaten access to journalistic privilege, and one response was to seek statutory protection at the federal level. Wright and Graham's discussion is liberally peppered with references to hearings in both the House and Senate.[25] While for the most part avoiding advocacy, Wright and Graham nevertheless demonstrate an inclination toward a broader interpretation of who might be covered.

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[19] Wright and Graham, *supra* note 3, at 753. They note the quality of "periodicity" or regularity was contributed out of studies by Vincent Blasi. See Vincent Blasi, *Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS, cited in Association of the Bar of the City of New York, JOURNALISTS' PRIVILEGE LEGISLATION 10 (1973)

[20] Cook, supra note 3, at 10.

[21] Monk, *supra* note 6.

[22] *Id.* at 26.

[23] *Id.* at 28.

[24] *Id.* at 31.

Maurice Van Gerpen also examined issues arising in the early-seventies debate on federal legislation, quoting several of those testifying at the congressional hearings, including former Congressman Jerome Waldie: "I can't think of a worse area for Congress to get involved in than attempting to identify who is a news person. . . . Those are artificial distinctions the first amendment never encompassed. The first amendment was seeking to protect a flow of information."[26] Van Gerpen went on to touch very briefly on various other aspects of the debate, including whether scholars, free-lancers, or books might be included.[27]

The New York Bar Association's Committee on Federal Legislation[28] recommended drafting legislation that would allow for a broadening of the definition of who would be covered,[29] but the committee's approach was essentially quite narrow and professionally oriented. It included free-lancers if established as professional journalists but excluded potential journalists; and again, they suggested a requirement of periodicity, which would exclude book publishing.[30] Similarly narrow was the prescription of Lesley de Ross Rood and Ann K. Grossman, who said that a survey of the state statutes not only revealed dismaying inconsistency as to who is covered (which would be remedied by a federal law) but also demonstrated that limits on who is covered by shield protection *must* exist.[31]

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[25] Wright and Graham, *supra* note 3.
[26] Van Gerpen, *supra* note 4, at 151.
[27] *Id.* at 150.
[28] New York City Bar Assoc., *supra* note 19.
[29] Arguing that Congress does, indeed, have a constitutional basis for enacting such legislation, the committee pointed out that Congress, at least, would have the power to amend a law as needed. *Id.* at 19.
[30] *Id.*

Frequently, discussions aimed at defining those entitled to privilege related the issue to the question of licensing. Glenn A. Browne pointed out that the absence of licensing and an excessively loose definition of who is covered left the courts with no guidance in adjudicating the point.[32] T. Barton Carter, Marc Franklin and Jay B. Wright similarly noted the relationship to licensing and recommended that shield laws be broad but clear as to who is entitled to privilege.[33]

Predictably, advocacy of more inclusive definitions of "newsgatherer" or "journalist" was found in studies of journalistic privilege that focused on non-traditional media. Maurice R. Cullen[34] and Joel M. Gora[35] were concerned with the eligibility of the underground press for journalistic privilege. Stephen F. Rohde[36] was concerned with *Silkwood v. Kerr-McGee*, involving the decision as to whether a filmmaker is entitled to journalistic privilege.[37] Although Rohde's primary concern was for those involved in filmmaking, his argument extended to all media: "Any First Amendment privilege against compulsory disclosure of confidential information must protect persons and organizations who obtain such information in the process of disseminating it to the public, *regardless of*

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[31] Lesley de Ross Rood and Ann K. Grossman, *The Case for a Frederal Journalist's Testimonial Shield Statute*, 18 HASTINGS CONST. L. Q. 779, 805-806 (1991). What is startling about the Rood and Grossman recommendation is that it was written as recently as 1991 yet is similar to comments made twenty years earlier.

[32] Glenn A. Browne, *supra* note 16, at 753.

[33] Carter et al. *supra* note 4, 501.

[34] Maurice R. Cullen, MASS MEDIA AND THE FIRST AMENDMENT 219 (1981).

[35] Gora, *supra* note 16.

[36] Stephen F. Rohde, *Real to Reel: The* Hirsch *Case and First Amendment Protection for Film-makers' Confidential Sources of Information*, 5 PEPP. L. REV. 351 (1978).

[37] 563 F. 2d 433 (10th Cir.1977).

the particular medium involved, whether it be books, pamphlets, magazines, newspapers, broadcasts or motion pictures."[38]

Somewhat surprisingly, little has been written specifically about the inclusion of book authors, despite the potential difficulty in distinguishing between journalistic and non-journalistic books. Van Gerpen was generally concerned that books be considered among eligible media.[39] Oddly enough, in a book devoted to the legal aspects of book publishing by Victor Kovner and Gabriel Perle,[40] discussion of privilege was limited to two brief treatments. One was the citation of two cases (*Branzburg* and *People v. LeGrand*[41]) in a chapter devoted to a case list, despite the existence of several other possibly relevant cases by the time of its 1984 publication date.[42] Otherwise, there was limited coverage of shield laws in a chapter by Goodale et al.[43] Equally odd, that chapter was concerned almost entirely with the issues of traditional journalistic privilege and only briefly considered who, other than reporters, might be covered -- with just passing reference to books.

Only Kraig Baker's recent commentary on who has standing to claim journalistic privilege addressed specifically the question of non-traditional journalistic media.[44] Baker described who seems to be defined as "the protected class," noting decisions in the Second Circuit on the *von Bulow v. von Bulow*[45] case and the Ninth Circuit in the recent *Shoen v. Shoen*[46] case. He described an emergent test he called the "*von Bulow* test," which "defines a member of the protected class as anyone who, at the inception of the newsgathering process, had the intent to disseminate information to the public. If the intent is present, the method of dissemination is irrelevant as long as it serves as a vehicle for information and opinion."[47]

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[38] Rohde, *supra* note 36, at 356 (emphasis in the original).
[39] Van Gerpen, *supra* note 4.
[40] Kovner and Perle, *supra* note 16.
[41] 415 N.Y.S. 2d 252, 67 A. D. 2d 446 (1979).
[42] Richard Dannay, *Selected Case List* in 1 Kovner and Perle, *supra* note 16, at 7.
[43] Goodale et al., *supra* note 16.
[44] Baker, *supra* note 7, at 739.
[45] 811 F. 2d 136 (2d Cir. 1987).
[46] 5 F. 3d 1289 (9th Cir. 1993).

Beyond the "*von Bulow* test," Baker noted that courts' analyses of claims of journalistic protection appear to contain three common elements: First, the courts seem to require that the class in question serves a public interest. Second, they balance the law's traditionally narrow view of privileges and the need to expand the protected class in order to maintain consistency in applying the journalist's privilege. Finally, the courts' determinations are often "driven by the unique facts of each case."[48] Baker next looked very briefly at some case law, primarily *Silkwood*. The remainder of his comment was dedicated to discussing how the "*von Bulow* test" would be applied to small circulation newsletters (they would mostly have standing to assert the privilege) and to authors of fiction (they would not). His commentary brought some of the debate of the issues up to date, although it did not address current state statutory coverage.

In sum, literature that considers the terminology of state shield laws exists, although much of it is not current and does not focus on the specific question of non-traditional journalistic media as eligible for protection. Literature abounds addressing who *should* or *could* be included in the class of people constituting "the press," "newspersons," "journalists," or "newsgatherers" eligible for journalistic privilege, but only Cook[49] and Monk[50] addressed the question of who *is* currently included -- Cook dealing with statutory terminology as of 1973, and Monk considering both statute and case law decisions as of 1986. Baker addressed the specific question of non-traditional journalistic media, but his study is primarily prescriptive rather than analytical. This study seeks to fill in the gaps among these studies, adapting and updating some of their approaches to complete the picture.

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[47] Baker, *supra* note 7, at 759.
[48] *Id.* at 750.
[49] Cook, *supra* note 3.
[50] Monk, *supra* note 6.

Justification

Functional distinctions among the media are increasingly becoming blurred. Reporters are writing books that involve investigative reporting, and these books can be produced and distributed in less time than many magazines. Filmmakers may make movies from those books or documentaries that provide the public with information that may have been buried in the back pages of local newspapers. Electronic media promise to provide informational outlets of almost limitless reach and blinding speed, even on the most specialized subjects. The possibilities for promoting the free flow of information are mushrooming. At present, narrow interpretations of who is included in the class of those protected by journalistic privilege may seem to threaten the continued flow of information from confidential sources to those able to disseminate it -- whatever their medium. Knowing the current status of the non-traditional journalist, in the courts and under statutes, will provide a sense of where the best protection may be found, or at least, where success in claiming privilege may be most predictable.

Research Questions and Method

The purpose of this paper is to examine who, beyond those traditionally considered journalists, has been afforded or denied protection in the courts as well as under state shield laws, and on what basis the determination was made. That will be accomplised by addressing the following research questions:

1. Which non-traditional journalists are covered and which excluded under existing state shield laws?

2. In tests of eligilibility for journalistic privilege, how have non-traditional journalists fared when the decisions were based on state shield laws?

3. In tests of eligilibility for journalistic privilege, how have non-traditional journalists fared when the decisions were based on First Amendment considerations?

4. What have been the courts' considerations in each situation?

The study will begin with a survey of the wording of state shield laws concerning who is currently covered. Statutes were identified first by the listing in the *News Media and the Law* survey,[51] then checked against current statutes in state codes; text was supplied from the codes themselves or from Wright and Graham's discussion.[52] Next it will discuss cases in which state law has been applied or construed to determine whether a non-traditional journalist could claim privilege, noting what aspect of the statute formed the basis for granting or denying privilege. It will then examine cases in which assessment of eligibility for privilege was based on First Amendment considerations, similarly noting the arguments used to determine the status of the non-traditional journalist. Cases were identified through various sources, including law review and other secondary literature, mention in other cases, and shephardizing of *Silkwood* and *von Bulow*. Finally, the significant differences in approach seen in the statutes and the two types of cases will be discussed, along with implications for the role of the non-traditional journalist in the flow of information to the American public.

State Shield Laws

This study of who is currently considered eligible for journalistic privilege begins with the wording of the statutes of the twenty-nine shield-law states and the District of Columbia.[53] Predictably, terminology in these laws varies, both in degree of specificity and in scope. The results of the survey of the statutory terminology are summarized in the accompanying Table 1, "Characteristics of Eligibility," which warrants both explanation and discussion. What is of interest is how and in what terms the statutes describe the persons to whom shield protection is available. Are they identified as particular kinds of

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[51] *Confidential Sources and Information*, *supra* note 13.

[52] Wright and Graham, *supra* note 3.

[53] In fact, in 1977 New Mexico's law was held unconstitutional under state law for being a rule of evidence that may not be legislated; and a court rule was adopted in its place. N. M. SUP. CT. R. 11-514. New Mexico is nonetheless included as a shield-law state for the purposes of this study.

Table 1 -- Characteristics of Eligibility in State Shield Laws

STATE	Specify person? 1=open list; 2=closed list	Must be employed or connected to org.?	Info. rec'd while employed or connected?	Need intent to disseminate?	Specific medium? 1=open list; 2=closed list	Req'd. traits of medium?	For gain or livelihood?
Alabama ALA. CODE §12-21-142 (1986 & Supp. 1992)		√					
Alaska ALASKA STAT. §09.25.300-390 (1994)	2				2		
Arizona ARIZ. REV. STAT. ANN. §12-2237 (1982 & SUPP. 1992)	1	√			2		
Arkansas ARK. STATS. ANN. §16-85-510 (1987 & SUPP. 1994)	2	√			2		
California CAL. EVID. CODE §1070 (West 1985); also CAL. CONST. art. I, §2(b).	1	√	√	√	2		
Colorado COLO. REV. STAT. ANN. §13-90-119; §24-72.5-102(1987 & Supp. 1994)	2	√		√			
Delaware DEL. CODE ANN. tit 10, §4320 (1975)	1			√			√
District of Columbia D.C. CODE ANN. § 16-4701-4702 (1993)		√	√				
Georgia GA. CODE ANN. §24-9-30 (1990)				√	2		
Illinois IL. ANN. STAT. ch. 735, para. 5/8-80 (Smith-Hurd 1993 and Supp. 1994)	1		√				
Indiana IND. CODE §34-3-5-1 (1986 & SUPP. 1994)		√			2		√
Kentucky KY. REV. STAT. §421.100 (1992)		√			2		
Lousisana LA. REV. STAT. ANN. §1451 (West 1982)	2*	√			1		
Maryland MD. CODE ANN., CTS. & JUD. PROC. §9-112 (1989)		√	√		2		
Michigan MICH. STAT. ANN. §28.945(1) (Callaghan 1985 & Supp. 1994-95)	1			√			
Minnesota MINN. STAT. ANN. §595.023 (west 1988)				√			
Montana MONT. CODE ANN. §26-1-902 (1993)		√	√		2		
Nebraska NEB. REV. STAT. §20-144 (1991)				√	1		
Nevada NEV. REV. STAT. 49-275 (1986 & Supp. 1991)	2*				2		
New Jersey N.J. STAT. ANN. §§2A:84A-21 AND 21a: Rule 27 (West 1976 & Supp. 1993)		√	√			√	
New Mexico N.M. SUP. CT. R. 11-514 (1986)		√	√			√	
New York N.Y. CIV. RIGHTS LAW §79-h (1992)					1	√	√
North Dakota N.D.CENT. CODE §31-01-06.2 (1976 & Supp. 1987)		√	√				
Ohio OHIO REV. CODE ANN. §2739.04 and 2739.11-12 (Page 1981 and Supp.1992)		√			2		
Oklahoma OKLA. STAT. ANN. tit. 12, §2506 (West 1980 and Supp. 1992)	2	√			1		
Oregon OR. REV. STAT. §44.510-540 (1989)							
Pennsylvania PA. STAT. ANN. tit. 42, §5942 (1985 & Supp. 1992) JUD. & JUD. PROC.		√		√	2	√	
Rhode Island R.I. GEN. LAWS §9-19.1-1 to 3 (1985 & Supp. 1992)	1				2	√	
South Carolina S.C. CODE ANN. §19-11-100 (Law. Co-op. 1993)							
Tennessee TENN. CODE ANN. §24-1-208 (1980 & Supp. 1992)				√			

* "Reporter" is the only term used.

professionals ("reporters" "journalists," etc.), as people working in particular media or organizations ("for a newspaper," "for a broadcast station"), or in particular circumstances ("for dissemination," "for gain"). Special attention was paid to just how specific and/or restrictive the wording was.

Two state statutes, Oregon's[54] and South Carolina's[55] are worded in the broadest possible terms across the board. South Carolina's statute begins: "A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium ...."[56] As the table illustrates, this broadness is the exception among states with shield laws, for all other state statutes contain some form of specification, definition, or restriction arising out of their wording, as illustrated in the following column-by-column discussion of the other states.

The first column on the table reflects whether the statute specifices a particular person or list of persons by title or occupation. The majority either use inclusive wording such as "including but not limited to" or describe in general terms the activities "any person" might be engaged in: "gathering, procuring, compiling, editing, or publishing."[57] These states are listed in Table 1 either as having an open list ("1") of those covered, or having no list at all.

Frequently, the wording specifies precisely not only who is covered but in what circumstances a person must find him- or herself in order to be covered by the statute. In some cases, this is achieved through an exhaustive and exclusionary list of persons covered, often provided as part of a "definitions" section of the law -- as in the case of Arkansas: "...any editor, reporter, or other writer for any newspaper or periodical, or radio station, or publisher of any newspaper or periodical or manager or owner of any radio station...."[58] These states are listed as having a closed list ("2") of persons covered. Louisiana[59] and Nevada[60] simply use the term "reporter" and go on to consider the media involved. With exceptions noted below, the exclusionary nature of these lists rules out coverage of the non-traditional journalist.

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[54] OR. REV. STAT. §44.520 (1989).
[55] S.C. CODE ANN. §19-11-100 (Law. Co-op. 1993).
[56] *Id.*
[57] MINN. STAT. ANN. §595.023 (west 1988).

Commonly -- in seventeen out of the thirty jurisdictions -- the definition of who is covered requires that the person be "employed," "engaged," "connected," or otherwise associated with some established media organization. States with this requirement are indicated by a check in the second column. In eight instances, the law further requires that the privilege will apply only if the information sought had been acquired while the person was associated with a media organization, as in Montana: "...person engaged, or who was so engaged at the time the information sought was procured...".[61] A check in the third column on Table 1 indicates the presence of this requirement.[62] These requirements effectively rule out the free-lancer.

Despite the logic that newsgathering implies an intent to disseminate, especially where mass media are concerned, only nine states include explicit wording like Tennessee's "for publication or broadcast."[63] Although at this stage in the analysis, the point may seem more pertinent to determinations of whether publication is necessary to invoke privilege -- which is beyond the scope of this study -- later discussion of First Amendment and common law protection will be concerned with the issue of intent on the part of the newsgatherer. Inclusion of this requirement explicitly in the statute is noted by a check in the fourth column on the eligibility table.

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[58] ARK. STAT. ANN. §16-85-510 (1987 & SUPP. 1994).
[59] LA. REV. STAT. ANN. §1451 (West 1982).
[60] NEV. REV. STAT. 49-275 (1986 & Supp. 1991).
[61] MONT. CODE ANN. §26-1-902 (1993).
[62] Illinois's statute uses the phrase "regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis and includes any person who was a reporter at the time the information sought was procured or obtained"; thus it is not listed as requiring employment but is listed as requiring the status of reporter at the time the information was conveyed. IL. ANN. STAT. ch. 735, para. 5/8-80 (Smith-Hurd 1993 & Supp. 1994).
[63] TENN. CODE ANN. §24-1-208 (1980 & Supp. 1992).

Terms defining the media involved may, like references to the people covered, be general, such as "newsmedium" or "news for broadcast or publication,"[64] or involve an open-ended list: "medium of communication shall include, but not be limited to...."[65] States with such broad terminology are indicated in the fifth column on the table as having either an open list ("1") of media specified or no list of specified media at all.

By far, the majority of states are quite specific about the media that convey eligibility-by-association (i.e., by dint of the news-gatherer's being employed or engaged by a media business or organization). Colorado, for example, defines "mass medium" as "any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system."[66] Such states, lacking open wording like "or any other such medium," are indicated as having a closed list ("2") of recognized media. Clearly, if books -- or electronic or other non-traditional media -- are not specifically named in these lists, journalists working in these media will be excluded.

Further, seven states including New York require that the medium meet some requirements or even thresholds of periodicity, regularity and circulation, as noted in the sixth column on the table. New York's definition of a newspaper, for example, is one "that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year . . . has a paid circulation and has been entered at the United States post-office as second-class matter."[67]

Beyond these general categories of requirements, there are predictable oddities in the requirements of some states. Ohio, for example, attempts to get around the narrowness of its terminology in the main title of the statute -- "Newspaper reporters not required to reveal source of information"[68] -- by offering a rather tortured definition of a newspaper: ". . . any such newspaper, magazine, or other periodical [sold or offered for sale in this state] is a newspaper."[69] Oklahoma excepts government employees from the roster of those eligible. [70]

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[64] MICH. STAT. ANN. §28.945(1) (Callaghan Supp. 1994).
[65] NEB. REV. STAT. §20-144 (1991), for example.
[66] COLO. REV. STAT. ANN. §13-90-119; §24-72.5-102 (1987 & Supp. 1994).
[67] N.Y. CIV. RIGHTS LAW §79-h (1992); also N.Y. CONST. art. I, §8.
[68] OHIO REV. CODE ANN. §2739.12 (Page 1981 and Supp. 1992.).

Regarding the specific question of book authors, Oklahoma,[71] Oregon,[72] Georgia,[73] and South Carolina [74] specifically include books among media in their lists, even if those lists are closed. Otherwise, no states use the word "author" in their definitions or text, though some, like Rhode Island, use the word "writer" in a longer list obviously intended to be inclusive.[75]

No statutes use the words "free-lance" or "free-lancer." However, in some cases the effect of combining open phrasing regarding who is eligible ("any person") with open terminology about the nature of the connection with a media organization -- like Alabama's "engaged in, connected with or employed on" [76] -- might be construed as allowing for a free-lancer under contract to an included agency. Colorado accommodates the "newsperson" who is an "independent contractor of a member of the mass media." [77] Only Tennessee explicitly includes a person who is "independently engaged in gathering information for publication or broadcast"[78] and has no formal or defined relationship to a particular contractor or employer.

Three states make reference to earning money as a newsgatherer, as indicated in the seventh column of the table. Indiana's statute includes having "received income from legitimate gathering, writing, editing, and interpretation of news"[79] as part of its description of eligible persons. Similarly, New York uses "for gain or livelihood" terminology in its definition of a "professional journalist."[80] Both, however, include a required relationship with a news organization, ruling out, at least statutorily, inclusion of the independent journalist or free-lancer, no matter how established or "professional."

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[69] *Id.* §2739.11.

[70] OKLA. STAT. ANN. tit. 12, §2506 (West 1980 and Supp. 1992). Relatedly, Oregon excepts "governmental utterances" or political publication. OR. REV. STAT. §44.510 (1989).

[71] *Id.*

[72] *Id.*

[73] GA. CODE ANN. §24-9-30 (1990).

[74] S.C. CODE ANN. §19-11-100 (Law. Co-op. 1993).

[75] "...in his capacity as a reporter, editor, commentator, journalist, writer, correspondent, newsphotographer, or other person directly engaged in the gathering or presentation of ..." R.I. GEN. LAWS §9-19.1-2 (1985 & Supp. 1992).

[76] ALA. CODE §12-21-142 (1986 & Supp. 1992).

[77] COLO. REV. STAT. ANN. §24-72.5-102 (1987 & Supp. 1994).

[78] TENN. CODE ANN. §24-1-208 (1980 & Supp. 1992).

Notably, Delaware has a unique definition of "reporter": "any journalist, scholar, educator, polemicist, or other individual . . . ," specifying further that the reporter must have been earning his or her principal livelihood as such for a precise proportion of the weeks preceding receipt of the subpoenaed information.[81] The requirement that the subpoenaed witness be identified as a professional because he or she spent a significant amount of time as a journalist (scholar, etc.) and earned money doing so is relevant to the attempt to define those entitled to journalistic privilege as members of a specific class.

Though these seven considerations appear in many combinations, the overall effect of these statutes -- with the possible exception of Oregon's and South Carolina's -- is to create a defined group whose requirements a person must meet to be eligible for shield protection. Most often, they call for a formal and economic relationship to a traditional media organization such as a newspaper, a broadcast station, or a press service. Moreover, there is a general inclination to try to define the eligible person in professional, or "professionalistic," rather than journalistic terms -- i.e., by referring to who the person must be ("reporter" "newscaster") and whether he or she has been established as such by the associated newsmedium. In some of the more restrictive states, that associated medium is yet further defined and limited, thus narrowing the potential membership in the group eligible for protection to those working in the most institutionalized quarters of journalism.

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[79] IND. CODE §34-3-5-1 (1986 & 1994 SUPP.).
[80] N.Y. CIV. RIGHTS LAW §79-h (1992).
[81] DEL. CODE ANN. tit 10, §4320 (1975).

When non-traditional journalists seek protection under such laws, the likelihood that they will be accorded shield law protection is obviously lower as restrictions increase. When subpoenaed, these newsgatherers may find it necessary to turn to higher courts to seek the privilege denied to them under these laws. In the following sections, the treatment of such cases in both state and federal courts will be considered. The first analysis will be that of decisions based on the state shield laws, followed by a review of decisions based on First Amendment considerations.

Cases Based on State Statute

In 1979 New York rejected resoundingly the request of author Lee Hays to be accorded testimonial privilege in *People v. LeGrand.*[82] Hays had contracted with a publishing house to write a book about an alleged "crime family" and was subpoenaed in connection with a trial of one of the family members. Referring first to New York's shield law, the court found that "these provisions evince a clear legislative design to benefit 'professional journalists' and 'newscasters' only. They should not by judicial fiat and strained interpretation be deemed to encompass those engaged in a different field of writing and research."[83] Subsequent discussion of the author's constitutional claims will be discussed in the next section below.

A year later, in *In re Haden Guest*, the New York Supreme Court in Bronx County ruled that as a regularly employed magazine reporter, a writer would be covered under New York's shield law; but the fact that he intended to write a book using the material he had received confidentially excluded him from claiming privilege. The decision followed the *LeGrand* decision, saying that the statute "applies only to professional journalists and newscasters acting in their respective medium."[84]

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[82] 415 N.Y.S. 2d 252, 67 A. D. 2d 446 (1979).

[83] 415 N.Y.S. at 255.

[84] *In re* Haden Guest, 5 Med. L. Rep. (BNA) 2361, 2364 (N.Y. Sup. Ct. 1980).

The Sixth Circuit of the U. S. Court of Appeals was asked in 1987 to rule whether Michigan's shield law (in its form at the time) was unconstitutional because it denied a television reporter journalistic privilege. Although the law was amended following the ruling in *Storer Communications v. Giovan*,[85] at the time the wording limited coverage to newspaper journalists. The reporter challenged the limitation on the basis of the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution,[86] saying Michigan's law distinguishing between broadcast reporters and newspaper reporters "bears no reasonable relationship to any legitimate state objective." But the court offered some rather tortured reasoning to the effect that the circumstances of the case merited distinguishing "visual evidence" from print information and denied privilege.[87]

With respect to the common situation of the investigative free-lancer who has acquired confidential information, California courts have heard three cases with conflicting results. In 1982 a free-lance reporter named Christopher Van Ness had had conversations with the widow of deceased comedic actor John Belushi and was subpoenaed in connection with the investigation of Belushi's death.[88] The court accorded Van Ness protection under California's shield law only because he could demonstrate that he had a contractual understanding with NBC. Under the statute, a formal arrangement with a publisher or organization is necessary; otherwise, the court said, "any intrusive and self-anointed 'busybody' could by subsequent self-proclamation assert privileges . . . meant and intended as a professional protection for a restricted class."[89]

More recently in 1992, two other California courts reached apparently contradictory decisions involving free-lancers. One involved a free-lancer who had written an article for *Insurance Journal* investigating an insurance company's financial problems.[90] J. Dale Debber had distributed drafts to a few people for editorial help and had posted the article (after publication) on an electronic bulletin board, which, the subpoenaing plaintiffs said, made clear that he was not a "newsperson." The court let stand a discovery referee's decision that the writer "did not have 'the status of a person who can assert the privilege as to his sources of information,'" without comment or explanation as to what part of his status was lacking.[91]

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[85] 13 Med. L. Rep. (BNA) 2049, 810 F. 2d 580 (6th Cir. 1987).

[86] U.S. CONST. amend. XIV, §1.

[87] 13 Med. L. Rep. (BNA) 2056. Although the history of inclusion of broadcast media in privilege lies outside the scope of this study, this case is included for the application of the Fourteenth Amendment as a possible means of extending the state law and the example of a court's refusal to go beyond the state statute -- as well as because of its relatively late date (the same year as *von Bulow*).

[88] *In re* Van Ness, 8 Med. L. Rep.(BNA) 2563 (Cal. Super. Ct.1982).

[89] *Id.* at 2564.

Only two weeks earlier a district court of appeals had granted privilege to a free-lancer with connections to *Hustler* and *Los Angeles* magazine in *People v. von Villas.*[92] The court noted that the state's shield law *and* the identically worded state constitution might not apply to the information acquired in the relatively short period when the writer was not formally associated with either magazine. "I believe that Golab is entitled to certain statutory and constitutional protection provided in this state except possibly for the free-lance period. But regard to his free-lance status, I find . . . that it represents an unsignificant [sic] phase of his activity on this article."[93] The opinion goes on to emphasize the reporter's thirteen years as an established journalist to shore up the argument for general eligibility.

Raising Fourteenth Amendment considerations in a similar argument to that mounted in *Storer Communications*, the court acknowledged the trial judge's opinion that he "would have serious trouble discriminating against his free-lance status under the [state] constitutional protections, because when someone as a free-lance [sic] needs to develop a relationship to be able to 'pitch' an article, that person's status is not fairly distinguishable from that of someone who is in the employ of an agency. . . . Therefore, I would have serious equal protection problems with distinguishing between Golab, the free-lance, and Golab, the Hustler special editor."[94]

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[90] Debber v. Los Angeles County Superior Court, S030799 (Cal. Super. Ct. 1993) as reported in NEWS MED. & LAW, Spring 1993, at 9.
[91] *Id.*
[92] 13 Cal. Rptr. 2d 62 (Cal. Ct. App. 1992), *cert. denied*, 113 S. Ct. 2970 (1993).
[93] *Id.* at 78.

The Illinois law was applied by the Seventh Circuit U. S. Court of Appeals in 1992, which found that "reporters who author books" were covered as long as they were employed reporters at the time the information was obtained. The case involved Seymour Hersh, and the court was compelled to note Hersh's established record as a reporter for magazines and newspapers.[95]

In 1992 an Arizona appellate court used Webster's definition of "news" -- "a report of recent events; material reported in a newspaper or news periodical or on a newscast; matter that is newsworthy" -- in combination with the state's statutory terminology to deny a book author's motion to quash a subpoena.[96] In *Matera v. Superior Court* the court interpreted legislative intent and case law as requiring association with "the organized, traditional, mass media" involved in the "gathering and dissemination of news to the public on a regular basis." In fact, the court denied that the statute constituted a shield law and held that it "was not designed to protect the information collected, but rather was designed to aid a specific class of persons -- members of the media -- in performing their jobs free from the inconvenience of being used as surrogate investigators for private litigants."[97] Further, the court asserted that "the statute does not protect all the activities of would-be publishers or newsgatherers."[98] It then went on to a discussion of constitutional issues, which will be discussed in the next section.

Most recently, in the case mentioned in the introduction to this study, a Lousiana court noted succinctly that, although the language of the state statute may have been intended to be inclusive, "Bosco and other books authors do not comfortably fit under these statues."[99] In a concurrence, Judge Grisham was at pains to scrutinize the wording of the Louisiana shield law, finding that the words "shall include," following a list of categories of media, signified an inclusive intent such that books as a form of communication would qualify and that, therefore, Bosco would qualify as a reporter.[100]

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[94] *Id.*
[95] Desai v. Hersh, 954 F. 2d 1408, 1411 n. 3 (7th Cir. 1992).
[96] Matera v. Superior Court, 825 P.2d 971, 973; 170 Ariz. 446 (Ariz. App. 1992).
[97] 825 P. 2d at 972.
[98] *Id.* at 974.

A pattern, overall, in these decisions emerges in their efforts to determine who has standing to claim protection from compelled testimony. Employment with, or failing that, contractual association with, an established organ of the institutional media was frequently the threshold requirement. In California, Debber's association with an electronic medium may well have excluded him from privilege. Moreover, in the case of a book author (Lee Hays), his contract with a non-periodical (or non-"regular") publisher was not enough to win protection. The courts in such cases make an effort to place the author or free-lancer in an inferred statutory framework, effectively defining a class of people eligible for privilege. Even when they have been inclined to include a journalist in a non-traditional situation, they have frequently referred to the writer's established reputation (in the cases of Hays, Hersh, and Golab) -- in effect, defending him as a member of the professional class to whom the privilege is applicable. One approach to broadening the limitations inherent in applying statutes has been to bring in consideration of the Equal Protection Clause. However, there has been no guarantee that the court will apply it in favor of the non-traditional journalist. These decisions thus echo the limitations inherent in the statutory efforts to delimit and, often, exclude, based as they are on the specific characteristics of the writer or journalist involved. As the study turns to decisions based on constitutional considerations, a trend away from this approach will be noted.

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[99] State v. Fontanille, 93-KH-935, 1994 WL 25830 (La. Ct. App. Jan. 24, 1994), *cert. denied,* KK 0247 (La. Sup. Ct. Feb. 25, 1994). at 2.

[100] *Id.* at 2, Grisbaum, concurring.

Decisions Based on Constitutional Grounds

The approach used by a U. S. District Court in *Apicella v. McNeil Labs*[101] is typical of many of these cases, although the court began by using the state statute's underlying interest in First Amendment rights as its starting point. The court then cited federal policy following the *Lovell* wording: "The liberty of the press is not confined to newspapers and periodicals....The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[102] The opinion then brought in Justice Powell's concept of the "informative function" of news media, highlighting his list of "lecturers, political pollsters, novelists, academic researchers, and dramatists."[103] Finally, concern for the public interest in having access to health information was then applied to the case at bar. The case involved a reporter for a medical newsletter, and the court noted the possibility that the public might suffer were sources hesitant to deal with investigators on health issues. [104] The inclusive language of *Lovell,* Powell's informative function, and the concern for public interest have often figured in evaluations of a non-traditional journalist's claim of privilege on constitutional grounds, although not always together and not always successfully.

The court in the *LeGrand* decision (discussed above), having found Lee Hays ineligible for privilege under the New York statute, went on to deal with Hays' constitutional claims.[105] Although accepting the combined effect of the First Amendment with the wording of *Lovell* extending to "every sort of publication," the court still declined to grant the privilege, making a somewhat tortured distinction between the activities of a "professional journalist" and that of an author unassociated with a recognized media organ: "Appellant, like most authors, is an independent contractor whose success invariably depends more on the researching of public and private documents, other treatises, and background interviews, rather than on confidential rapport with his sources of information."[106] The court did leave open the possibility of "some future situation in which an author's role would be clearly that of an investigative journalist whose work product will be published in book form."[107]

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[101] 66 F. R. D. 78 (E.D N.Y. 1975).
[102] Lovell v. Griffin, 303 U. S. 444, 452 (1938)
[103] 66 F. R. D. at 84, citing *Branzburg*.
[104] *Id.* at 85.
[105] People v. LeGrand 415 N.Y.S. 2d 252, 67 A. D. 2d 446 (1979).

The investigative creator in *Silkwood v. Kerr-McGee*[108] was more successful. The oft-cited 1977 case involved the subpoena of a free-lance reporter who had undertaken to make a factual film about Karen Silkwood, a former employee of Kerr-McGee, whose untimely death was being investigated. Interviewees in reporter Hirsch's investigation for the film had been promised confidentiality. Hirsch had been subpoenaed in Oklahoma and had appealed the court's denial of protection to the Tenth Circuit on First Amendment grounds. Citing *Lovell*, the court found that the fact that Hirsch was (while doing research for the movie) a filmmaker and "not a regular newsman [does not] limit the scope and extent of the constitutional privilege."[109] Noting its concern for an "underlying public interest," it also considered Hirsch's status as an independent film maker: "We are not prepared to say that the fact that Hirsch is not a salaried newspaper reporter of itself acts to deprive him of the right to seek protective relief."[110]

A District of Columbia court went further in 1979 and said that whether or not the "news gathering is conducted for financial gain is irrelevant," in *United States v. Hubbard*.[111] Timothy Robinson, a *Washington Post* reporter writing a book about the Church of Scientology, sought to quash a subpoena associated with one of the many cases involving Scientology. He had been subpoenaed regarding material for "a book he is writing for his own personal gain and not for *The Washington Post*" and therefore was ineligible for privilege, so the argument went. But the U. S. District Court judge disagreed. "Reporters normally receive salaries for their news gathering efforts. Such financial gain does not taint the importance of the services to our cherished first amendment goals. Second, the reporter's privilege must encompass all newsgathering efforts, not simply those for newspapers."[112] This court, too, cited *Lovell.*

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[106] 415 N.Y.S. 2d at 258.
[107] *Id.*
[108] Silkwood v. Kerr-McGee, 563 F. 2d 433 (10th Cir. 1977).
[109] *Id.* at 436.
[110] *Id.* at 437.
[111] 493 F. Supp. 202 (D.C. 1979).

A similar point was made in Pennsylvania in a case in which the eligibility of a book author, as such, was sidestepped [113] but "the fact that appellant sought to profit by its sale" was held to be "of no consequence."[114] In a dissent on another point, one of the judges asserted that the book involved (although found to be untruthful) addressed "important social and political issues and is therefore, in the main, 'core' first amendment speech."[115]

For many observers, the pivotal case concerning extension of journalistic privilege to book authors -- as well as to others who may seek an analogous extension -- is *von Bulow v. von Bulow*,[116] the notorious suit brought in 1987 by the children of socialite "Sunny" von Bulow against her husband concerning the suspicious circumstances of her death. In *von Bulow,* Klaus von Bulow's "intimate companion," Andrea Reynolds, sought journalistic privilege[117] to avoid submission of her reports and personal notes. Although the court denied privilege to Reynolds, it set forth guidelines that would later be applied in successful claims of privilege.

Beginning with references to *Silkwood* and *Apicella*, the court set the basis for considering "persons who are not journalists in the traditional sense of that term."[118]

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[112] *Id.* at 205.

[113] *In re* Grand Jury Matter, Gronowicz, 764 F. 2d 983, 995 (3d Cir. 1985). The court did note that, although the witness had withdrawn the claim of privilege, the fact that a book was involved did not necessarily rule out privilege.

[114] 764 F. 2d at 983, citing New York Times v. Sullivan, 376 U. S. 254.

[115] *Id.* at 995 (Higginbotham, J. dissenting).

[116] 811 F. 2d 136 (2d Cir.), *cert. denied*, 107 S. Ct. 1891 (1987).

[117] Along with "any other privilege that exists under the sun." *Id.* at 139.

[118] *Id.* at 143.

Moving to New York's shield law (by which this court was not bound), it acknowledged the state's policy of "giving protection to professional journalists."[119] The court's only nod to the restrictive *LeGrand* decision was to note that that court had left open the possibility that someday it might recognize an author's role as "*investigative journalist.*"[120]

Taking the underlying policies served by the state shield law -- i.e. a concern for First Amendment freedoms -- together with federal law's concern for "a paramount public interest,"[121] the court offered its guidelines: "Based on our analysis set forth above, we distill the essential characteristics of one entitled to invoke the journalist's privilege. We hold that the individual claiming the privilege must demonstrate . . . the intent to use material . . . to disseminate information to the public and that such intent existed at the inception of the newsgathering process."[122] Citing *Lovell,* the court emphasized the broad range of potentially eligible media. Finally it addressed the question of the professional status of a journalist qualified for privilege: "Although prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination, it is not the sine qua non. The burden indeed may be sustained by one who is a novice in the field."[123]

In September of 1993 the Ninth Circuit decided a case that followed *von Bulow* and articulated further its principles. *Shoen v. Shoen*[124] involved the feuding family members of the founder of the U-Haul empire. A U. S. District Court had denied privilege under the Arizona shield law and the *Matera* decision. On appeal, the Ninth Circuit accorded journalistic privilege to someone described as "an investigative author of books on topical and controversial subjects."[125] Citing both *Lovell* and *von Bulow,* the court said that it found the Second Circuit *von Bulow* reasoning persuasive and its test determinative: "The journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. . . . What makes journalism journalism is not its format but its content. Hence the critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public."[126]

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[119] *Id.* at 144.
[120] *Id.* Emphasis in original.
[121] *Id.*, citing New York Times v. Sullivan, 376 U. S. 254.
[122] *Id.*
[123] *Id.*
[124] 5 F. 3d 1289 (9th Cir. 1993)
[125] *Id.* at 1290.

Though not citing the *von Bulow* decision, federal courts in Massachusetts and Pennsylvania both used the same "dissemination to the public" standard to decide a case involving financial reporting. In *Summit Technology v. Healthcare Capital Group,*[127] the Massachusetts court was asked to determine whether a financial analyst writing for a specific audience was a member of "the organized press *per se*."[128] The court held that, since state and federal constitutional guidelines were effectively the same, prior determinations (under *Dun and Bradstreet v. Greenmoss Builders*[129]) that financial communication is protected under the First Amendment meant that an investigative writer in financial communication would be protected from compelled testimony. "Whether or not Roberts is a member of the 'organized press' per se, it appears that he is engaged in the dissemination of investigative information [and that information] relates to 'matters of public concern.'"[130] The Pennsylvania case, *In re Scott Paper Co.*,[131] a district court cited *Lovell* to extend protection to a Standard and Poor's investigator concerned with corporate ratings.[132] Distinguishing newsletters aimed at the public from publications designed to meet an individual investor's particular needs, the court noted that the threshold concern was that the dissemination of information be "for the benefit of the general public."[133]

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[126] *Id.* at 1293. The adamant opinion listed important social critics in U.S. history and asserted that "it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic." *Id.*

[127] 141 F. R. D. 381 (D. Mass. 1992).

[128] *Id.* at 384.

[129] 472 U.S. 749 (1985).

[130] 141 F. R. D. 381.

[131] 20 Med. L. Rep. (BNA) 2164, 2166 (E. D. Pa. 1992).

[132] *Id.* at 2166.

Most recently, in the Lousiana case involving Joseph Bosco, the court based its decision on Justice Powell's concept of the "informative function" and cited the *von Bulow* and *Shoen* decisions specifically with respect to book authors. The court focused on the *Shoen* court's desire to "protect the activity of 'investigative reporting' more generally."[134]

A case in which recourse to First Amendment considerations was, as in *LeGrand*, unsuccessful for the non-traditional journalist was one in which the *Silkwood* and *von Bulow* decisions were rejected. In *Matera v. Superior Court,*[135] the court noted that *Branzburg* had preserved the freedom for states "to create, expand or restrict protection for publishers as they see fit"[136] and stated simply, "Matera urges us to expand the privilege in Arizona along the lines of these cases, so that the privilege would apply to anyone who is engaged in gathering any publishing information which is of topical and widespread interest. We refuse to do so."[137]

The two cases, then, in which application of First Amendment considerations proved unhelpful to the non-traditional journalist were those where limiting state shield laws had already been applied. Possibly, the courts involved were preserving the approach prompted by the defining nature of the laws -- aimed at naming traits and qualifications of persons to be included.

By contrast, the approach taken in the other cases may be described as one concerned with function. Indeed, although Justice Powell's concept of the informative function of the journalist was not always explicitly cited, it was this concept that underlay successful arguments for constitutional protection. Rather than search for litmus-test characteristics -- employment, contractual arrangement, income, or association with established press organizations -- the courts looked to the gathering- and disseminating-functions of the journalist, above all with an eye to serving the public interest. In *Hubbard*, *Apicella*, and *Gronowicz*, the decisions confronted head-on and found irrelevant the issue of employment and/or financial gain -- which are often part of the wording of state statutes and figured in statute-based decisions like *LeGrand*, *Haden Guest*, *Van Ness* and *von Villas*. For the judges participating in the *LeGrand* and *Matera* decisions -- where the exclusionary style of statutory definition pervaded the reasoning, the reputation of the journalist as a member of an identifiable "professional" class was significant. Courts disposed to employ First Amendment considerations in cases like *Silkwood*, *von Bulow* and *Summit* looked at the degree of professional attainment and, similarly, found it only relevant insofar as it factored into determining intent to disseminate. Cases based on constitutional arguments, even before *von Bulow*, applied what Baker proposed as the "von Bulow test" -- the intent to disseminate to serve the public interest.

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[133] *Id.* at 2167.

[134] State v. Fontanille, 93-KH-935, 1994 WL 25830 (La. Ct. App. Jan. 24, 1994), *cert. denied,* KK 0247 (La. Sup. Ct. Feb. 25, 1994). at 3, citing *Shoen*.

[135] Matera v. Superior Court, 825 P.2d 971, 170 Ariz. 446. (Ariz. App. 1992).

[136] 825 P. 2d at 974, citing *Branzburg*.

[137] *Id.* at 975.

Summary and Conclusions

Where journalistic protection is established and measured by statute, then, there is a demonstrable tendency to define and delimit those eligible in terms of professional characteristics. For those whose function is journalistic but whose description may be untraditional -- like the book author, the free-lancer, the contributor to electronic media or even the scholar[138] -- protection under the First Amendment is much more tenable, tending to be based on function rather than description. That function, identified by Justice Powell as the "informative function," comprises the gathering and dissemination of information for public benefit; and as both he and the *Lovell* court observed, it can be performed by a non-exclusive "class" of journalists.

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[138] *See, e.g.*, Scarce v. U.S., 21 Med. L. Rep. (BNA) 1972, 5 F. 3d. 397 (9th Cir1993).

In 1968 -- before *Branzburg* -- in *State v. Buchanan* ,[139] a reporter for a student newspaper in Oregon unsuccessfully sought the privilege to refuse to disclose the identity of her source "on constitutional and professional-ethics grounds."[140] The arguments most often mounted against the potential restrictiveness of narrowly defined statutes appeared in the very wording used to deny her journalistic privilege: "An invitation to the government to grant a special privilege to a special class of 'news gatherers' necessarily draws after it an invitation to the government to define the membership of that class. We doubt that all news writers would want the government to pass upon the qualification of those seeking to enter their field."[141]

As we have seen, where legislatures and courts have done just that -- statutorily defined the membership in that class -- the result is likely to be restrictive and problematic for those working outside the institutional press. The temptation to define "journalist" in a "professionalistic" way thus serves neither the journalist nor the public. To quote the reluctant court in *Buchanan*:

> Assuming that legislators are free to experiment with such definitions, it would be dangerous business for courts, asserting constitutional grounds, to extend to an employe of a 'respectable' newspaper a privilege which would be denied to an employe of a disreputable newspaper; or to an episodic pamphleteer; or to a free-lance writer seeking a story to sell on the open market; or, indeed, to a shaggy nonconformist who wishes only to write out his message and nail it to a tree. If the claimed privilege is to be found in the Constitution, its benefits cannot be limited to those whose credentials may, from time to time, satisfy the government.[142]

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[139] State v. Buchanan, 436 P. 2d 729 (Sup. Ct. Or. 1968).
[140] *Id.* at 730.
[141] *Id.* at 731.
[142] *Id.* at 732.

Abstract

Taming the Watchdog: Justice Byron White and the Repudiation of Press Privilege

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Writing for the majority in three landmark press privilege cases, Justice White articulated a view of the press-government relationship at odds with the watchdog concept embraced by more liberal Supreme Court justices. At the same time, the opinions express key concepts concerning the "search for truth" and the reasonableness of government actions that can be traced to White's dissents in other cases, including criminal justice cases. An analysis of White's press privilege decisions in the context of the earlier criminal cases suggests that he was able to shape the opinions to reflect his own view of the proper role of the press in a democracy to a significant degree. That view, grounded in mistrust of growing media power and an overriding concern for the smooth operation of the justice system, is remarkably consistent throughout White's long tenure on the Court, challenging the conventional characterization of White's judicial philosophy as elusive or inscrutable.

TAMING THE WATCHDOG:

Justice Byron White and the Repudiation of Press Privilege

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TAMING THE WATCHDOG:

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I. Introduction

Since his retirement from the Supreme Court in 1993, after 31 years of service, Justice Byron R. White has been the subject of numerous tributes[1] and lengthy analyses of his jurisprudence.[2] Of all these, perhaps the most revealing is the terse farewell of Chief Justice Rehnquist, who makes the paradoxical observation that his colleague "authored more than 450 majority opinions for the Court," yet "no 'Byron R. White School of Jurisprudence' remains behind."[3] Rehnquist praises White as "a jurist without ideology or social agenda" who refused to be pigeonholed,[4] but the same qualities the Chief Justice finds so admirable have perplexed other commentators. Indeed, at the center of the emerging debate over White's judicial philosophy is whether he even had one, or whether his approach to constitutional law was so pragmatic and case-oriented as to elude doctrinal categorization entirely.[5]

Significantly, Chief Justice Rehnquist chooses to single out "one area...in which Justice White's opinions for the Court have changed the legal landscape"[6] -- the First Amendment. While scholars may disagree about White's constitutional vision, there is no mistaking his substantial impact on press law, particularly in defining and redefining the legal limits of journalistic privilege.

This paper examines Justice White's views on journalistic privilege and the underlying principles that appear to have guided his most controversial opinions on this issue. Part II sets forth the purpose and scope of the inquiry. Part III defines the terms of the inquiry and advances the proposition that White's opinions in key cases were strongly influenced by his conceptions of the "reasonableness" of government actions, particularly in the area of criminal justice, and his misgivings concerning the increasing power of the press. Part IV reviews the relevant primary and secondary sources and the latter's divergent interpretations of White's voting record. Part V offers analysis of three landmark press privilege cases in the context of White's evolving views on the proper relationship between press and government. Part VI presents discussion and conclusions concerning the findings.

II. Purpose

It's no secret that Justice White has been no friend of the press. The most casual review of his tenure reveals that he doesn't believe the First Amendment provides the press with any special protection against grand jury subpoenas,[7] against third-party search warrants,[8] or, in libel cases, against wide-ranging discovery demands,[9] and he has been in the vanguard of efforts to narrow the definition of a "public figure" in the wake of New York Times v. Sullivan.[10] Indeed, in most of the cases that have been commonly regarded as representing setbacks for press freedom over the past 25 years -- from Branzburg v. Hayes to Hazelwood School District v. Kuhlmeier -- White has been not only firmly in the majority but the author of the offending opinion. Even on those occasions when he has sided with the rights of journalists despite conflicting government interests, his concurrences have been grudgingly rendered -- as in the historic Pentagon Papers case, in which he allowed that prior restraint may be advisable in other instances.[11]

Some press observers have speculated that White has some kind of animosity toward the press as an institution, but White's defenders contend that he has received a "bad rap" from journalists because he's been the author (but by no means the only proponent) of many unpopular First Amendment decisions.[12] Yet it is one thing to note White's seeming hostility toward the press, and another to explain it. Journalists, who tend to be proprietary about the First Amendment and to have an almost limitless sense of the "privilege" it affords them, would do well to consider the implications of White's repudiation of press privilege, in the key majority opinions he wrote and in some notable dissents. To seek to understand White's particular "newsman's privilege," defined as the "alleged constitutional right...of a newsman to refuse to disclose the sources of his information."[13] For purposes of this study, the concept of journalistic privilege is limited to the claim of confidentiality -- the "right" not to disclose sources, notes, files, editorial discussions, and other elements of the newsgathering process to outside entities, including the government. The rationale for this approach is twofold: first, confidentiality is an ongoing concern of journalists, a common tool in investigations of all sorts, and arguably, as two scholars have put it, "an indispensable mechanism of reporting about government"[14] -- as we shall see, it is frequently at the heart of arguments by press petitioners seeking relief from governmental interference in the newsgathering process. Second, operationally speaking, limiting the inquiry to cases involving confidentiality has the advantage of focusing attention on a handful of highly significant cases rather than an avalanche of opinions addressing defamation or media rights of access (including the much-scrutinized free press-fair trial cases), although some discussion of White's position on press "privilege" in a wider sense is required as well.

Another difficulty, implicit in the question as stated, is methodological: to what extent are White's "views" embodied in opinions that reflect the will of the majority of the Court, and how are those views to be discerned? "The author of the Court's opinion," notes Harold J. Spaeth, "is not a free agent; typically he must also satisfy the views of at least four other justices besides himself."[15] Clearly, any traditional analysis of one Justice's views must assume that the author of a majority opinion writes for himself or herself as well as others. In order not to stretch that assumption too far, much of this analysis will be devoted to key concepts and formulations that can also be found in dissenting opinions by White in other cases and may, with some justification, be considered his own.

Within these limitations, it is possible to demonstrate that White's opinions on press privilege, while couched in the language of empirical reasoning and the necessity of applying a balancing test to competing interests, actually disclose a set of values that are unsympathetic and even inimical to the watchdog function of the press. Central to the thesis of this paper is the notion that White was far less concerned about the Fourth Estate's historic role as a check on government than in the various ways a rogue press might obstruct justice. A close reading of the cases below suggests that White, in keeping with his Justice Department background and abiding deference to the "good faith" efforts of law enforcement, was disinclined to credit press complaints of government interference; in fact, he expressed suspicions that reporters sought, not only immunity from civic obligations, but to usurp the functions of government (see Part VI, below). He readily dismissed "chilling effect" arguments (i.e., that violations of press confidentiality would harm the newsgathering process) as speculative, while treating comparable concerns about potential harm to the processes of criminal justice as immediate and concrete. In short, White's opinions on privilege represent a concerted effort to reassert the authority of government over a press perceived as irresponsible, arrogant, and dangerous.

IV. Literature Review

Evaluations of White's tenure on the Supreme Court offer an unsettling portrait of a Justice who was both adored and loathed. The most scathing appraisal, from former White clerk Jeffrey Rosen, views him as "a perfect cipher" who "never transcended his initial incarnation as the jock justice" and produced "slipshod prose and often unsupported conclusions."[16] Discerning no guiding legal philosophy behind White's myriad opinions, Rosen suggests that White was more interested in stiff-arming the arguments of his opponents than in articulating a constitutional vision.[17] Other, less caustic commentators have managed to damn White with faint praise, characterizing him as "enigmatic," "little disposed to reflection or speculation," a workhorse whose contributions to legal doctrine, depite his evident intellect, "are not especially distinctive."[18]

White's defenders, of course, take strong exception to such comments. They consider White's celebrated pragmatism as a virtue, not a flaw; his job was to decide cases,[19] and he tended to approach each case "from the facts up rather than the doctrine down,"[20] becoming a leading advocate of judicial restraint and the separation of powers, railing against his colleagues whenever he perceived that they were engaging in "judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution,"[21] or worse, "an exercise of raw judicial power."[22] Noting his training at Yale in the tradition of legal realism, some have argued that White is essentially a "legal realist,"[23] while others have stressed that his preference for facts over theory makes the terms "pragmatic functionalist"[24] or "modified legal realist" more appropriate.[25]

It is beyond the scope of this summary to do justice to the intricate analyses of White's pragmatism that have emerged since his retirement. There is, however, one point that his admirers and his critics agree upon that has tremendous bearing on the topic at hand. More than most of his colleagues, White was willing to concede that judges are essentially shapers of public policy, performing a delicate balancing act in the face of competing interests and real-life circumstances. While he often invoked the principles of stare decisis, his notions of constitutionality extended beyond strict exegesis of the text of the Constitution[26] or even reverence for hidebound precedent. White valued "reasonable" and practical considerations over abstractions,[27] and he was particularly unswayed by absolutist arguments concerning freedom of expression. Or, as Washington and Lee University law professor Allan Ides so provocatively puts it:

> for White, the First Amendment does not operate merely as a trump on government power. First Amendment values are not independent constructs; rather, those values are integrated components of a political system, and as such they can only be defined as they function within that system.[28]

White's views on the proper "function" of the press within the political system emerge most dramatically in his opinions on matters of journalistic privilege. The three major cases of interest are Branzburg v. Hayes, Zurcher v. Stanford Daily, and Herbert v. Lando. (Although Herbert is a civil case, its frame of reference arguably places it alongside the earlier two cases, squarely at the heart of the debate over government interference with the newsgathering process.) The text of these decisions will be addressed in the analysis and conclusions of this paper, not here. However, it is worth noting that all three cases have attracted considerable comment, criticism, and cries for clarification, not only in the popular press, but within the judiciary.

Branzburg has probably generated the most confusion. The Court's opinion, which declines to grant journalists "a testimonial privilege that other citizens do not enjoy,"[29] has been widely regarded as in invitation to states to fashion their own shield laws.[30] But some courts have read the plurality decision as affording reporters a "qualified" privilege to protect sources, while some have taken Justice Powell's concurring opinion as the "controlling" opinion of the case[31] -- leading one author to conclude that "the 'true' holding in the Branzburg case is hardly self-evident,"[32] and others to denounce the decision as "supported by elaborate but demonstrably specious reasoning."[33] Significantly, members of the Court have sought to explicate its ruling in this case on several subsequent occasions.[34]

Zurcher and Herbert have sparked their share of controversies as well. The former led to a 1980 federal law restricting (but not eliminating) the exercise of search warrants on news organizations,[35] while the latter has been interpreted as negating some, or all, of the "alleged" constitutional privilege of confidentiality in libel cases -- while simultaneously being dismissed as having no bearing on the issue of confidential sources.[36]

Whatever else one makes of the conflicting interpretations of these cases, one can reasonably conclude that there are hazards to White's characteristic "just-the-facts" manner of shaping his opinions to the matter at hand, which leaves unresolved issues to be addressed either through legislation or ad hoc balancing procedures by other courts. The situation also invites further research, in the form of an inquiry into the language and reasoning of the opinions themselves, in an effort to discern the guiding principles of White's repudiation of press privilege.

V. Analysis

A. Branzburg and Press Privilege

The Supreme Court addressed the question of a journalistic privilege of confidentiality for the first time in the Branzburg decision of 1972 -- actually a trio of cases involving reporters in Kentucky, California, and Massachusetts, respectively, who had been subpoenaed by grand juries investigating drug dealing and the Black Panthers.[37] Prior to that decision, there had been numerous confrontations between journalists and legislative or judicial entities over confidentiality dating back to 1857,[38] and several reporters had gone to jail on contempt charges rather than divulge sources.[39] Yet the development of a specific constitutional argument for protection of sources appears to be of fairly recent origin, having surfaced most notably in a 1957 libel case filed by Judy Garland,[40] but the Court had declined to hear that case. Fifteen years later, when it finally dealt with the issue in Branzburg, the result was a stunning defeat for the press.

In order to gauge the scope of that defeat, it's important to note that the reporters in Branzburg weren't seeking an absolute privilege not to testify before grand juries. They were claiming the right not to disclose confidential sources unless the government could demonstrate that the information was relevant, that it could not be obtained another way, and that the state had a "compelling interest" in obtaining the information; in effect, they wanted to apply the same tripartite criteria for disclosure, on an ad hoc basis, that Justice Stewart had formulated (while serving on the Second Circuit) in the Garland v. Torre case.[41] Yet five justices declined to endorse even that limited notion of privilege.

Writing for the Court, Justice White repeatedly emphasized that reporters weren't exempt from responding to subpoenas "as other citizens do,"[42] that they had no more right than "the average citizen"[43] not to disclose confidential information to a grand jury, and that they certainly had no "testimonial privilege that other citizens do not enjoy"[44] -- in short, that the First Amendment provided the press with no special protection at all in a grand jury setting. The broad investigative powers of a grand jury were clear, he wrote, while the "consequential, but uncertain burden on newsgathering"[45] that might result from source disclosure was difficult to determine; in any event, the certain harm to criminal investigations that would be done if reporters could exempt themselves from testimony surely outweighed any nebulous press concerns about a chilling effect. Moreover, the "creation of new testimonial privileges" should be avoided, as a general principle, since "such privileges obstruct the search for truth."[46]

Summarized in terms of its basic judicial reasoning, the Branzburg decision may appear to be another case of "balancing" First Amendment claims against competing social and governmental interests, in the tradition of, say, Dennis v. United States.[47] Yet Branzburg goes further than that, offering a stinging rebuke of the press and revealing rhetorical flourishes rarely found in White's numerous majority opinions. The harsh language of the opinion is surprising, given the tenuous accord the majority had reached. Although technically a 5-4 ruling, Branzburg is a sharply fragmented decision.[48] Justices Burger, Blackmun, and Rehnquist joined in White's opinion, but Justice Powell's concurrence stresses the "limited nature" of the decision and offers journalists a foundation for case-by-case challenges of subpoenas (and, as noted earlier, is often considered the "controlling" opinion).[49] Three dissenting justices (Brennan, Stewart, and Marshall) endorsed the reporters' quest for limited privilege, while another (Douglas) presented an absolutist argument for journalistic immunity.

Despite these deep divisions, the tone of the Court's opinion is hardly conciliatory. White not only rejects reporters' claims of special status, he goes on to accuse the press of seeking to protect "a private system of informers...unaccountable to the public."[50] He frets that a journalistic privilege could be abused "by groups that set up newspapers to engage in criminal activity."[51] And, perhaps most extraordinary of all, he ridicules the "theory" of press privilege in language laced with sarcasm:

> Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.[52]

Of course, no one in the press was advancing such a theory. The press argument in Branzburg is that the Court should adopt the case-by-case criteria for source disclosure one of its own members had first proposed fifteen years earlier -- a request so modest that it offended the absolutism of Justice Douglas, who chided the New York Times for taking the "amazing position" that First Amendment rights should be "balanced" in any way.[53] The limited nature of the claim seems particularly remarkable in hindsight, since the reporters who had received subpoenas were, in effect, risking their lives and reputations in an effort to cover the burning social issues of the 1960s -- the drug culture, racial violence, the rise of revolutionary groups such as the Black Panthers -- and had found themselves in the intolerable position of being viewed by law enforcement as possible criminal accomplices and by their confidential sources as suspected government stooges.[54] For White to question the judgment of reporters who put themselves in the position of witnessing crimes is one thing, but to characterize the journalist's choice as one of "writing about crime or doing something about it" goes much further. It suggests not only that writing about crime is not in itself a public service, but that the journalist's true duty as a citizen is to act as an agent of the police.

Where does such a formulation come from? The answer can be found, at least in part, in some of White's other opinions on the compelling needs of law enforcement and the "search for truth" -- a phrase which, in White's writings, usually refers to judicial and prosecutorial functions rather than journalistic ones. This is not to say that the other justices who signed on to the ruling in Branzburg weren't equally persuaded of its basic finding -- that the First Amendment doesn't exempt reporters from grand jury subpoenas -- but that the particular terms of this repudiation of press privilege are White's own, and that they can be traced to earlier writings couched in much the same terms. In fact, the "law and order" context of Branzburg emerges most clearly when the case is compared to two notable White dissents from the 1960s, Escobedo v. Illinois and Miranda v. Arizona. Neither case would appear to have much to do with the First Amendment, and they are rarely discussed in connection with White's attitudes toward the press. Yet they reveal a great deal concerning White's views on the overriding need to protect the most essential functions of government.

B. The Law and Order Background of Branzburg

In the summer of 1964, in the midst of his second full term on the Warren Court, Byron White released the first of what would become a significant series of dissents in criminal cases, taking his colleagues to task for extending rights of due process for defendants that, he was convinced, would severely hamper the ability of police and prosecutors to protect the public. The question at hand was whether incriminating statements Danny Escobedo made to police before his indictment for murder should have been admitted at his trial.[55] The Court held that Escobedo's right to counsel had been violated; White emphatically disagreed.

The vitriolic dissent is vintage White. Noting that the Court had already declared that indicted defendants have a right to have counsel present during questioning,[56] White complained that "this new and nebulous rule of due process" was now being extended to any identified suspect in a case, creating "an impenetrable barrier to any interrogation....unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side."[57] White considered this development to be at odds with the police duty to obtain probative evidence, with compulsory searches allowed under the Fourth Amendment, and with the counsel-less "inquisitorial grand jury proceedings" permitted under the Fifth Amendment.[58] However, what earned White's sharpest rebuke is the notion that even voluntary confessions, in the absence of counsel, are inevitably coerced; such reasoning "reflects a deep-seated distrust of law enforcement"[59] that White didn't share:

> Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate court to discern and correct such violations of the law.[60]

As a former deputy attorney general, White was hardly naive enough to believe that coerced confessions didn't occur. When sufficiently persuaded by the evidence, he continued to find such confessions inadmissible throughout his career.[61] Yet White also believed that the criminal justice system was self-correcting to a great extent, that prosecutors and police generally acted in good faith -- in short, that the system worked, provided the Court did not impede the administration of justice by granting too wide a berth to individual rights. As Yale law professor Kate Stith has pointed out, the criteria of "reasonableness" and "good faith" are "at the core of much of White's jurisprudence," particularly in his approach to such thorny constitutional issues as search warrants, grand juries, and the right against self-incrimination.[62]

This central affirmation of faith in the justice system, already explicit in Escobedo, emerges even more powerfully in White's celebrated dissent in Miranda two years later. White makes several characteristic objections to the majority opinion: that the Court is embarking on "new law and new public policy" without sufficient empirical investigation or consideration of the social consequences;[63] that a requirement to advise suspects of their right to counsel before any questioning can take place would undermine the police and "measurably weaken the ability of the criminal law" to apprehend, prosecute, and ultimately rehabilitate criminals;[64] that the opinion was a "constitutional straitjacket" on state courts and legislatures.[65] But the "nub of this dissent" is exactly what had rankled White about Escobedo -- his colleagues' "deep-seated distrust of all confessions," as if the police were inherently in the wrong.[66] Such lack of faith prompts White to bluntly lecture the Court on its need to get its priorities straight:

> The most basic function of any government is to provide for the security of the individual and of his property....Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.[67]

Protection of society and the smooth operation of the criminal justice system were matters of paramount importance to White. His much-celebrated pragmatism frequently consisted of weighing the abstract benefits of some "judge-made" elaboration of individual constitutional rights against the social consequences, which he tended to regard as much more tangible. He was sensitive to the public perception that the Court sometimes freed criminals on "technicalities," and on several occasions he took pains to remind his colleagues that their staunch defense of the rights of the defendant had an enormous social cost. (One well-known dissent in a due process case begins, "The respondent in this case killed a 10-year-old child. The majority sets aside his conviction...and under the circumstances probably makes it impossible to retry him."[68]) His opinion that the Fourth Amendment exclusionary rule need not bar evidence obtained in good faith follows a similar line of reasoning, concluding that the "marginal or nonexistent benefits" of suppressing evidence in the case at hand "cannot justify the substantial costs of exclusion."[69] And he flatly rejected death-penalty arguments that amounted, in his view, to "an indictment of our entire system of justice," echoing the affirmations of faith in that system found in Escobedo and Miranda:

> Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder.[70]

An overriding concern for the efficacy of the justice system is also manifest in the Branzburg decision. Allan Ides has argued, "The significance of White's opinion in Branzburg does not lie in its rejection of a reporter's privilege, but in the manner in which that privilege was denied."[71] Ides is referring to the "functionalist" nature of White's reasoning, but I would contend that White's seemingly empirical approach is strongly grounded in his law-and-order orientation. Despite being presented with studies by Vincent Blasi and others that indicated the use of confidential sources was essential to investigative reporting,[72] White concluded that reporters' fears of a chilling effect are "to a great extent speculative" -- and, in any event, should not take precedence "over the public interest in pursuing and prosecuting those crimes reported to the press" by confidential sources.[73] In dissent, Justice Stewart noted that the Court "never before demanded that First Amendment rights rest on elaborate empirical studies,"[74] but White's approach to the question, weighing a nebulous "right" against a measurable obstruction to the search for truth, is remarkably similar to Miranda -- it just hadn't been applied to a press case before.

Viewed in the context of these earlier decisions, Branzburg reveals a great deal about White's views of the proper role of the press in a democracy. He notes at the outset that the press is entitled to "some" protections under the First Amendment, then proceeds to detail how limited in scope those protections really are.[75] While reporters are free to gather news "from any source by means within the law,"[76] the notion that reporters should "conceal information relevant to commission of a crime" because of confidential source agreements has "very little to recommend [it] from a the standpoint of public policy."[77] The idea that reporters should set up their "private system of informers" -- writing about crime instead of doing something about it -- is abhorrent to White. Those sources who are involved in crimes, he reasons, aren't "deserving" of constitutional protection, while the rest would probably be better off going to the police or the local prosecutor, "placing their trust in public officials as well as reporters."[78]

This last statement is perhaps the most remarkable in all of Branzburg. Clearly, there are many sources who turn to the press precisely because they cannot go to public officials without great personal risk -- including whistle-blowers, police concerned about corruption, career criminals, radical activists, and counterculture types who don't share White's trust in government. The chilling effect argument is premised on the idea that reporters need to cultivate such sources, and that driving them away cripples the press's ability to perform its watchdog function -- which, in theory, is constitutionally protected. One need not be an absolutist to argue that the press clause of the First Amendment is not simply a redundancy to the guarantee of free speech, but rather grants some recognition of special protection of the press as an institution; Justice Stewart, for example, readily embraced the watchdog concept, reasoning that the "primary purpose" of the press clause was "to create a fourth institution outside the Government as an additional check on the three official branches."[79] Similarly, Justice Brennan's "structuralist" model of the press states that its role in gathering and disseminating information necessary for public discussion entitles it to "unique First Amendment protection."[80]

In the way White has presented the issue, Branzburg represents not only a rejection of press privilege in favor of the interests of justice, but a repudiation of the watchdog concept. White was willing to acknowledge that the press has certain protections -- against prior restraint, for example -- but he was opposed to the notion that the press clause provided reporters a special class of protection not enjoyed by the average citizen.[81] That he went further in this regard than his colleagues (with the exception, perhaps, of Chief Justice Burger) is evident in the evolution of the decision. In the Branzburg conference he reportedly declared, "Presently, I don't think I'd establish any privilege at all."[82] In oral arguments he took exception to the concept of a "newsman's privilege" that would not also encompass legislators, college professors, and the like,[83] and he turned the argument for confidentiality on its head, in this exchange with petitioner's attorney Edgar A. Zingman:

> THE COURT: As a practical matter, why would the people...running this hashish laboratory permit [a reporter] to publish the fact that there was this laboratory operating, but say, "Please don't publish our names"?
>
> MR. ZINGMAN: Well this, Mr. Justice White, I think goes to the heart of what we're talking about....There are dissident elements in the society today which for the first time, historically, the news media are really dealing with.... through investigative reporting they're dealing with the unorthodox, the rebellious, the youth, the drug culture, the hippies, the dissidents....There's

> great controversy in this country today about the question of legalization of marijuana. It's important for the public in determining that question to understand the attitude of those who use--
>
> THE COURT: Shouldn't the public have a right to know the sources of that information?[84]

In White's view, the public's "right to know" about criminal activity is not served by press privilege but obstructed; the search for truth is the province of the grand jury, in its "fundamental governmental role of securing the safety of the person and the property of the citizen."[85] Branzburg doesn't leave the press entirely defenseless -- White notes that there are other remedies to harassing subpoenas, short of invoking a constitutional privilege[86] -- but it does establish unequivocally that the newsgathering rights of reporters, when in conflict with government's primary mission, must give way. The watchdog, in other words, has a very short leash.

C. Zurcher and Herbert: Countering the Media's "Awesome Power"

In the wake of Branzburg dozens of state legislatures rushed to create or amend local statutes protecting some limited form of journalistic privilege. By the end of the 1970s 26 states had adopted shield laws,[87] while dozens of lower federal and state court decisions had adopted Justice Stewart's criteria for source disclosure in non-grand-jury cases, providing reporters with significant avenues of relief.[88] In practical terms, the decision had proven to be less than the full-scale catastrophe the press had feared it would be, but it was far from inconsequential, particularly as it provided a framework for two subsequent decisions, Zurcher v. Stanford Daily and Herbert v. Lando, that further limited the scope of press privilege. While quite different in circumstances, both cases reflect White's ongoing repudiation of chilling effect arguments in defense of confidentiality (and, by extension, the "watchdog" role of the press as defined by those who believe it worthy of special protection). Indeed, the two opinions can be seen as a kind of two-pronged judicial invasion of the sanctum sanctorum of the press -- the newsroom.

The connection between Zurcher and Branzburg is clear. Faced with the question of whether the government had the right to serve a third-party search warrant on a student newspaper in order to obtain evidence of a crime (photographs of demonstrators battling police), the Court split 5-3 along the same lines as in Branzburg, with White writing the majority opinion, Powell concurring, and Stewart and two other justices (Stevens and Marshall) in dissent. Once again, the Court held that the right of the state to investigate criminal activity -- in this case, through application of the Fourth Amendment rules of search and seizure rather than a grand jury proceeding -- outweighed press concerns about confidentiality.[89]

Ironically, the press was put in the position of arguing that the government should have sought to obtain the alleged evidence through a subpoena, a la Branzburg, since a search warrant could expose files and confidential information that had nothing to do with the present investigation. The newspaper wasn't claiming that the evidence sought was confidential -- it didn't even exist[90] -- but it was claiming that newsroom searches would have a far-reaching chilling effect on newsgathering. In his dissent Justice Stewart took this claim quite seriously, reasoning that "the knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources."[91]

The Court's opinion counters this central objection in two familiar ways. First, "rational" prosecutors know when a subpoena will suffice instead of a warrant,[92] and warrants must meet "the test of reasonableness," as applied by "neutral magistrates"[93] -- here we have another affirmation of what Ides calls White's "basic faith in the American system of democracy and in the people who work within that system."[94] Second, White's handling of the chilling effect argument is ruthlessly empirical. White had reasoned that Branzburg's impact was limited only to those reporters who may have information of interest to a grand jury, and in Zurcher he points out that the press can cite even fewer cases ("very few instances") of newsroom searches. It was a rare event, and proof that sources were drying up was even rarer. "This reality hardly suggests abuse; and if abuse occurs, there will be time to deal with it."[95]

White's pragmatism is as ingenious as it is unanswerable. It may have seemed obvious to many observers, including Justice Stewart, that newsroom searches have a negative effect on the newsgathering process, but there was no empirical evidence to that effect -- nor, perhaps, could there be. How do you quantify a chilling effect? How do reporters know when sources don't call? How do they know those sources aren't talking because of a newsroom search? In Branzburg White had rejected studies that showed how reliant investigative reporters are on confidential sources, on the grounds that it wasn't predictive of how sources would react to the subpoena issue; now he had taken his skepticism a step further, implying that the press would have to demonstrate damage from government interference before he would credit that the chilling effect was even an issue.

This "show me" attitude toward chilling effect arguments is a theme in White's opinions on the press, emerging most notably in his dissent in Gertz v. Robert Welch Inc. Although Gertz is a defamation case, White's dissent is an eloquent statement of his concerns about the growing power of the press in general. In White's view, New York Times v. Sullivan properly established that seditious libel "falls beyond the police power of the state,"[96] but the Court's opinion in Gertz, requiring that private persons establish negligence and show damages in libel actions, "is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme."[97] Adopting a line of reasoning consistent with Branzburg and Zurcher, White complains that the press has presented "no hard facts" to support its claim that libel actions are chilling the free flow of information,[98] and the Court's decision to "raze" state libel laws is particularly galling "in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few."[99] He concludes, "I would await some demonstration of the dimunition of freedom of expression before acting."[100]

The relevance of the Gertz dissent to press privilege issues is implicit but unmistakable. The power of the press is such that its claims of special status under the First Amendment should be regarded with caution, White believes, and efforts to seek judicial relief on the basis of a chilling effect should require empirical proof of harm. (Significantly, Gertz is a glaring exception to what Stith calls White's "unusual commitment to the rule of stare decisis in constitutional adjudication."[101] He acquiesced to Miranda in spite of his strong views on the matter, but he continued to rail against the Gertz holding in subsequent opinions, declaring at one point that "it should be overruled."[102])

The shadow of the Gertz dissent looms over not only Zurcher but the Herbert decision as well. Here the Court was addressing the discovery rights of a public-figure plaintiff in a defamation suit rather than the interests of the criminal justice system, but the result was another setback for the concept of press privilege. Herbert has nothing to do with specific source disclosure, but the press argument against inquiry into editorial communications and thought processes asserts an "editorial privilege" of confidentiality which, if breached, could have a chilling effect on newsgathering. In a 6-3 opinion the Court rejected that assertion, with White (who had already declared in Gertz that libel laws pose "no realistic threat to the press"[103]) writing for the majority.

Although press critics responded with outrage to the Herbert opinion,[104] the Court's finding is hardly surprising. Since public figures must establish proof of actual malice to prevail in defamation actions, there is logic to allowing the plaintiff to inquire into a reporter's or editor's state of mind -- leveling the playing field, as it were -- and six justices unequivocally endorsed that right. Yet the particular terms of White's repudiation of editorial privilege are telling. The chilling effect objection is discarded by reasoning that "only knowing or reckless error will be discouraged"[105] -- in other words, knowing that the editorial process is subject to discovery will actually help journalists exercise care in newsgathering. And, echoing Branzburg, White flatly rejects the assertion of a constitutional privilege that ordinary citizens do not enjoy, musing that "the outer boundaries of the editorial privilege now urged are difficult to perceive,"[106] and drily adding that even the President doesn't possess absolute immunity from disclosing evidence subpoenaed for a judicial proceeding.[107]

In dissent Justice Brennan insisted that the question of editorial privilege should be dealt with on an ad hoc basis rather than blithely dismissed. After all, the Sullivan case was intended to prevent public officials from using civil libel actions to accomplish what they couldn't achieve through the power of the state -- muzzling the press.[108] Precisely because Anthony Herbert was a public figure (but not, at the time of the case, a government official), "the values at issue are sufficiently important to justify some incidental sacrifice of evidentiary material."[109] To this Justice Stewart and Justice Marshall added their concerns about the potential for discovery abuse -- the deposing of CBS producer Barry Lando had already stretched over more than a year and yielded 2,903 pages of transcript and 240 exhibits[110] -- and its possible chilling effect.

Mushrooming civil litigation costs and exhaustive inquiries into reporters' thought processes are quite arguably greater threats to a free press than the kind of government actions sanctioned in Branzburg and Zurcher, particularly in light of subsequent legislation that mitigated the impact of those decisions.[111] However, the majority was quite unmoved by these arguments. White's response to the concerns about discovery abuse is a characteristic affirmation of the system: "reliance must be had on what in fact and in law are ample powers of the district court to prevent abuse."[112] Once again press claims of special status had been weighed against the compelling needs of the judicial process, and against the remedies available within that process, and had been rejected.

VI. Conclusions

Mistrust of media power and faith in the "reasonableness" of the American system of government are twin themes in White's press opinions. The former led him to be highly skeptical of chilling effect arguments, since he refused to believe that "the press, as successful and powerful as it is, will be intimidated into withholding news."[113] The latter fueled his resistance to constitutional interpretations that would afford the press special status, exempt it from testimonial or evidentiary obligations, or immunize it from the consequences of its own irresponsible behavior. Concerns for a free press, he wrote, "should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter."[114]

In his handling of press privilege cases, White articulated a view of the press-government relationship that was considerably at variance with the watchdog concept embraced by more liberal justices (e.g., Stewart, Brennan, and Douglas). Any reverence he might have accorded the Fourth Estate as a check on government was clearly overshadowed by his concerns about a powerful private institution seeking constitutional privileges that the average citizen could not also invoke. In his opposition to such favors he was remarkably consistent, to a degree that contradicts those who have found his guiding judicial philosophy maddeningly unpredictable or simply inscrutable. Indeed, those seeking to define White's constitutional "vision" will find much to contemplate in his writings on press privilege.

This is not to say that White's approach to the privilege issue was primarily ideological. His objections to the assertion of privilege in the three cases discussed above were couched in pragmatic terms. "In each case," White biographer Dennis Hutchinson has noted, "practical interests defeat hypothetical risks, and doctrinal structure is logically applied."[115] One could argue that the press made ill-defined arguments for privilege in each case and miserably flunked White's empirical analysis. If reporters are to be exempt from grand jury testimony, what about authors and pamphleteers -- where does "newsman's privilege" end? If discussions between reporters and editors are privileged, what about discussions between reporters and third parties? Yet it seems doubtful that even a narrowly defined, scrupulously applied privilege would have met White's approval. No matter how high the watchdog jumped, it could never be above the law.

The Court's opinions in Branzburg, Zurcher, and Herbert are so consistent, thematically and logically, in the terms of their repudiation of press privilege -- and so in accordance with White's own views, as expressed in dissents from Miranda to Gertz and beyond -- that they invite further inquiry into the process of Supreme Court opinion assignment and the degree to which White's majority opinions embody a coherent individual view. Studies of White's voting behavior indicate that he "ended his judicial career as he conducted it: without closely aligning himself with either ideological wing of the Court."[116] His customary position as the "swing vote" may account for the staggering number of majority opinions he authored for the Court; apparently, being a non-ideologue (or a "perfect cipher") has its advantages. Yet in the press privilege cases, in which he was solidly in the majority or at least the plurality's camp, he was able to shape the opinions to reflect his own formulations of the press-government relationship to a significant degree. In so doing he managed to shift the terms of the debate over privilege from the chilling effects of government interference on newsgathering to questions about the civic responsibilities and excessive power of the press -- questions that persist to this day.

END NOTES

1. The tributes are too numerous to mention, but among the most notable are those collected in 103 Yale Law Journal 1-56 (1993), 107 Harvard Law Review 1-26 (1993), and 1994 Brigham Young University Law Review 209-226 (1994).

2. See, for example, Allan Ides, "The Jurisprudence of Justice Byron White," 103 Yale Law Journal 419-460 (1993); Rex E. Lee and Richard G. Wilkins, "On Greatness and Constitutional Vision: Justice Byron R.White," 1994 Brigham Young University Law Review 291-312 (1994); and Michael Herz, "Justice Byron White and the Argument That the Greater Includes the Lesser," 1994 Brigham Young University Law Review 227-281.

3. William H. Rehnquist, "A Tribute to Justice Byron R. White," 33 Washburn Law Journal 5-6 (1993).

4. Id., at 5.

5. See, for contrast, Ides, op. cit., and Jeffrey Rosen, "The Next Justice," The New Republic April 12, 1993, 21-26.

6. Rehnquist, op. cit., at 5.

7. Branzburg v. Hayes, 408 U.S. 665 (1972).

8. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

9. Herbert v. Lando, 441 U.S. 153 (1979).

10. See, for example, Gertz v. Robert Welch Inc., 418 U.S. 323, 369-404 (1974) (White, J., dissenting), and Dun & Bradstreet v. Greenmoss, 472 U.S. 749, 765-774 (1985) (White, J., concurring).

11. New York Times Co. v. United States, 403 U.S. 713, 731 (1971) (White, J., concurring): "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about Government plans or operations."

12. Among those who have sought to explain White's opinions in terms of personal animus are Murray Kempton and Charles McCabe, cited in Dennis Hutchinson, "The Man Who Once was Whizzer White," 103 Yale Law Journal 43, 53-54 (1993). See also the discussion of White's relationship with the press in "Perspectives on White: A Roundtable," 79 ABA Journal 63, 68-73 (October 1993), including Rex Lee's recollection of a verse sung by well-wishers at White's retirement party: "He knows the First Amendment/ He learned it up at Yale/ But when he writes opinions/ Reporters go to jail."

13. Joseph R. Nolan and M.J. Connolly, eds., Black's Law Dictionary, 5th ed. (St. Paul, Minnesota: West Publishing, 1979), at 753, 940.

14. Monica Langley and Lee Levine, "Branzburg Revisited: Confidential Sources and First Amendment Values," 57 George Washington Law Review 13, at 41 (1988).

15. Spaeth, "Distributive Justice: Majority Opinion Assignments in the Burger Court," in Studies in U.S. Supreme Court Behavior, Harold J. Spaeth & Saul Brenner, eds., 81-82 (New York: Garland Publishing, 1990).

16. Rosen, op. cit., at 21.

17. Id., at 22.

18. The assessments of various White-watchers are quoted in Kenneth Jost, "The Courtship of Byron White," 79 *ABA Journal* 63 (1993).

19. Lance Liebman, "A Tribute to Justice Byron R. White," 107 *Harvard Law Review* 13, 14 (1993).

20. Allan Ides, "Realism, Rationality, and Justice Byron White: Three Easy Cases," 1994 *Brigham Young University Law Review* 283 (1994).

21. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

22. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

23. See, e.g., Warren E. Burger, "Cheers! A Tribute to Justice Byron R. White," 1994 *Brigham Young University Law Review* 220 (1994).

24. Herz, *op. cit.*, at 227.

25. Ides, "The Jurisprudence of Justice Byron White," at 461.

26. *Id.*, at 458.

27. Kate Stith, quoted in "Perspectives on White: A Roundtable," *op. cit.*, at 73.

28. Ides, *op. cit.*, at 433-434.

29. 408 U.S. 665, 690.

30. 17 states had shield laws at the time of the *Branzburg* decision, 25 by 1974. See Kenneth S. Devol, ed., *Mass Media and the Supreme Court*, 4th ed., at 96 (New York: Hastings House, 1990).

31. Paul Marcus, "The Reporter's Privilege: An Analysis of the Common Law, *Branzburg v. Hayes*, and Recent Statutory Developments," 25 *Arizona Law Review* 815, at 836 (1983).

32. *Id.*, at 839.

33. Willard L. Eckhardt, Jr., and Arthur Duncan McKey, "Reporter's Privilege: An Update," 12 *Connecticut Law Review* 435, at 436 (1980).

34. See, for example, *Saxbe v. Washington Post*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting); and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 594-596, n.21 (1975) (Brennan, J., concurring).

35. Devol, *op. cit.*, at 103.

36. Marian E. Lindberg, "Source Protection in Libel Suits After *Herbert v. Lando*," 81 *Columbia Law Review* 338, at 357 (1981).

37. The three cases are *Branzburg v. Hayes*, *In re Pappas*, and *United States v. Caldwell*.

38. Cf. Mauri[illegible] Van Gerpen, *Privileged Communication and the Press*, at 6-16 (Westport, Connecticut: Greenwood Press, 1979).

39. *Id.*, at 11, 15.

40. Garland v. Torre, 259 F. 2nd 545 (2nd Cir.), cert. denied, 358 U.S. 910 (1958). Also see Van Gerpen, op. cit., at 15, and Eckhardt and McKey, op. cit., at 435-436.

41. See discussion in Robert G. Berger, "The 'No-Source' Presumption: The Harshest Remedy," 36 American University Law Review 603, at 608-611 (1987).

42. 408 U.S. 665, 682.

43. Id.

44. Id., at 690.

45. Id.

46. Id., cf. n.29.

47. 341 U.S. 494 (1951).

48. See Van Gerpen, op. cit., 105-106.

49. 408 U.S. 665, 709 (Powell, J., concurring).

50. Id., at 697.

51. Id., at 705 n.40.

52. Id., at 692.

53. 408 U.S. 665, at 714 (Douglas, J., dissenting).

54. See Van Gerpen, op.cit., 32-40.

55. Escobedo v. Illinois, 378 U.S. 478 (1964).

56. Massiah v. United States, 377 U.S. 201 (1964).

57. 378 U.S. 478, at 496 (White, J., dissenting).

58. Id., at 497.

59. Id., at 498.

60. Id., at 499.

61. See, for example, Edwards v. Arizona, 451 U.S. 477 (1981) (White, J.) and Arizona v. Fulminante, 499 U.S. 279 (1991)(White, J., authoring majority opinion but dissenting from majority's holding that admission of involuntary confession should be subject to harmless error analysis).

62. Kate Stith, "Byron R. White, Last of the New Deal Liberals," 103 Yale Law Journal 19, at 30 (1993).

63. Miranda v. Arizona, 384 U.S. 436, 531 (1966)(White, J., dissenting).

64. Id., at 541.

65. *Id.*, at 545.

66. *Id.*, at 537-538.

67. *Id.*, at 539.

68. *Brewer v. Williams*, 430 U.S. 387, 429-430 (1977) (White, J., dissenting).

69. *United States v. Leon*, 468 U.S. 897, 922 (1984) (White, J.).

70. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (White, J., concurring).

71. Ides, *op. cit.*, at 437.

72. See Vincent Blasi, "The Newsman's Privilege: An Empirical Study," 70 *Michigan Law Review* 229-284 (1971), cited in *Branzburg*, 408 U.S. 665, at 694 n.33.

73. 408 U.S. 665, at 694.

74. *Id.*, at 723 (Stewart, J., dissenting).

75. *Id.*, at 681-685 (White, J.).

76. *Id.*, at 682.

77. *Id.*, at 696.

78. *Id.*, at 695.

79. Potter Stewart, "Or of the Press," 26 *Hastings Law Journal* 631, at 634 (1975).

80. William J. Brennan, Jr., "The Press and the Courts," in Devol, *op. cit.*, at 136.

81. See Michael J. Armstrong, "A Barometer of Freedom of the Press: The Opinions of Mr. Justice White," 8 *Pepperdine Law Review* 157, at 179 (1980).

82. Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action*, at 165 (New York: Addison-Wesley Publishing Co., 1990).

83. Philip B. Kurland and Gerhard Casper, eds., *Landmark Briefs and Oral Arguments of the Supreme Court of the United States: Constitutional Law*, 74:678-679 (Arlington, Virginia: University Publishers of America, 1975).

84. *Id.*, 679-680.

85. 408 U.S. 665, at 700.

86. *Id.*, at 706: "the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm."

87. Van Gerpen, *op. cit.*, at 126.

88. Eckhardt and McKey, *op. cit.*, at 436.

89. *Zurcher v. Stanford Daily*, 436 U.S. 547, 567-568 (1978).

90. Id., at 576 (Stewart, J., dissenting). The newspaper had no photos of the demonstration beyond what had already been published.

91. Id., at 573.

92. Id., at 563 (White, J.).

93. Id., at 565.

94. Ides, op. cit., at 456.

95. 436 U.S. 547, at 566.

96. 418 U.S. 323, 387 (1974) (White, J., dissenting).

97. Id., at 399.

98. Id., at 390.

99. Id., at 402.

100. Id., at 404.

101. Stith, op. cit., at 31.

102. Dun & Bradstreet v. Greenmoss, 472 U.S. 749, 774 (1985) (White, J., concurring).

103. 418 U.S. 323, at 390 (White, J., dissenting).

104. See, e.g., Brennan, "The Press and the Courts," op. cit., at 138, and Lyle Denniston, "The Burger Court and the Press," in Herman Schwartz, ed., The Burger Years: Rights and Wrongs in the Supreme Court 1969-1986, at 30 (New York: Viking, 1987).

105. 441 U.S. 153, 173 (1979).

106. Id., at 170.

107. Id., at 175.

108. Id., at 191 (Brennan, J., dissenting).

109. Id., at 195.

110. Id., at 202 (Stewart, J., dissenting).

111. According to Lyle Denniston, the threat posed by the Herbert decision isn't just that "public figures could get access to more evidence they would need to win libel damages," but that "it also ensured that...they could get some satisfaction by exposing to public view the 'malpractice' supposedly occurring in the nation's newsrooms. Vindication could be had in more than one way." Denniston, op. cit., at 30.

112. 441 U.S. 153, at 177.

113. 472 U.S. 749, at 774 (White, J., concurring).

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114. Florida Star v. B.J.F., 491 U.S. 524, at 547 n.2 (1989) (White, J., dissenting).

115. Hutchinson, op. cit., at 53.

116. Rex E. Lee and Richard G. Wilkins, "On Greatness and Constitutional Vision: Justice Byron R. White," 1994 Brigham Young University Law Review 302 n.63. Also see Rosen, op. cit., at 26.

ANTI-ABORTION POLITICAL ADS: BALANCING QUESTIONS OF INDECENCY, CENSORSHIP, AND ACCESS

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ANTI-ABORTION POLITICAL ADS: BALANCING QUESTIONS OF INDECENCY, CENSORSHIP, AND ACCESS

Political advertising enjoys unique privileges in American broadcasting. Section 315 of the Communications Act of 1934 requires station licensees to provide equal opportunities to legally qualified candidates for public office,1 meaning if a station permits one candidate to use its facilities, all other candidates for that office are entitled to equal time. Even if a station chooses to refuse all political ads, in some instances it cannot; Section 312(a)(7) of the Act permits the Federal Communications Commission (FCC) to revoke a broadcast station license if the licensee fails to provide "reasonable access" to a legally qualified *federal* candidate for public office.2

The ultimate privilege, however, deals with content. Unlike other advertising or programs, the content of political ads is not subject to control by the individual stations. Section 315(a) states in part, "that such licensee shall have no power of censorship over the material broadcast under the provisions of this section."3

Perhaps the most controversial application of these two sections has been the recent use of explicit pictures of aborted fetuses in the television ads of anti-abortion candidates throughout the country. The no censorship clause of Section 315 protected the content of these ads; the candidates were on the air because they were running for federal office and were guaranteed access by Section 312(a)(7). The furor created by these spots prompted some licensees to ask the FCC for the right to reject these ads as unacceptable, or limit the times of day when they must be aired. More than two years after the first complaint was filed, the Commission ruled in September 1994 that neither the reasonable access law nor the no censorship clause preclude licensees from channeling these ads to times when children are less likely to be viewers.[4]

This paper will examine three aspects of the abortion ad controversy: indecency and safe harbor, censorship of political broadcasting, and reasonable access. It will explore the issues of law involved, specifically the pertinent sections of the Communications Act of 1934, and the court decisions and FCC rulings in the three areas. The position will be advanced that the Commission's 1994 Declaratory Ruling best serves both the public interest and the political process.

Basis for the study is provided by a review of the campaigns of the two candidates whose use of the explicit anti-abortion spots put the spotlight on this entire issue, and who, as of March 1995, are the only candidates to have been victorious in a primary election campaign using these political commercials--Michael Bailey of Indiana and Daniel Becker of Georgia. The paper also will challenge Bailey's charge that stations must be forced to air all television ads submitted by federal candidates.

Explicit Anti-Abortion Political Ads on Television

The use of explicit anti-abortion political spots became an issue three years ago, thrust into the national spotlight by a person who had not intended to be a candidate. Michael Bailey, a self-described born-again Christian and pro-life activist from southern Indiana, planned to use his background in advertising to become the campaign manager for candidates who shared his conservative Christian views. However, as the filing deadline approached for the 1992 Indiana primary, Bailey still was looking for someone to run for Congress in Indiana's ninth district against 14-term incumbent Lee Hamilton. So, Bailey decided to enter the race himself, as a candidate for the Republican nomination.[5] Bailey knew exactly what type of spots he wanted to run, and he also knew what the law would allow.

"And I was reading the law, the reasonable access law, that said if you are a federal candidate and you run for high office in America, your television ads, by law, cannot be censored. . . . And I went, 'Eureka, praise God! There's a way to get the truth on television.'"[6]

That "truth" was pictures of aborted fetuses. Bailey originally planned to photograph fetuses found in abortion clinic dumpsters, but settled for excerpts from a film, The Hard Truth, distributed by a company in Cleveland.[7] He created two spots for the primary campaign; the first, "Choice A/B" began with the disclaimer: "Warning: The following commercial has been paid for by the Bailey for Life for Congress Committee and is not suitable for small children." The spot, written by Bailey's wife, showed two healthy babies (Choice A), then a picture of an aborted fetus (Choice B).[8] Spot two, "Abortion is Evil," showed a number of aborted fetuses.[9]

Bailey bought time in Indianapolis and Louisville (and later, Cincinnati and Evansville) to reach the southeastern Indiana congressional district. Stations were reluctant to run his ads, but after consultations with their attorneys and the FCC, found they had no choice. One Louisville general manager editorialized against the commercials, announcing,"We find them awful. . . .";10 In Indianapolis, WISH-TV President and General Manager Paul Karpowicz charged Bailey with "taking advantage of a system that probably never anticipated anyone using it in this manner."11 Yet, on the day the Bailey ads first ran, the station devoted almost one-quarter of its early evening newscast to the controversy, including a live interview with the candidate.12

In the May primary, Bailey won a surprisingly easy victory over a former state auditor, capturing 59 percent of the vote, and winning all but one of the district's 21 counties.13 In preparation for the fall campaign against incumbent Hamilton, Bailey produced two more commercials. The first, "Life or Death," showed bloody body parts from dead fetuses; a woman's voice was heard in the background saying, "It's my body. It's my choice." The candidate closed the spot with, "Abortion is not a matter of choice. It is a matter of life and death."14

Bailey said the second spot, "Hitler," generated the strongest emotional response of any of his 1992 ads.15 Black and white photos of dead fetuses were shown alongside photos of dead bodies from World War II German death camps. The spot ended with an announcer asking, "If the people representing you in Washington don't respect human life, what can they respect?"16

In the November election, Bailey lost to Hamilton by the same margin as the Republican candidate in 1988 and 1990, 70 to 30 percent.**17** On election night, however, Bailey vowed to return in 1994, and told reporters, "We've got out a message that's never got out before. We're bringing, by God's grace, Christian principles back to the political system."**18**

No station tried to use the courts to stop Michael Bailey, but that was the route taken by a Georgia station in an attempt to stop candidate Daniel Becker. Becker, running for the 1992 Republican nomination for Congress in Georgia's ninth district (north of Atlanta, bordering on Tennessee), modeled two ads after Bailey's, and began running them during 4th of July weekend telecasts of Atlanta Braves baseball games.**19**

In anticipation of Georgia's runoff election on August 11, the law firm of Kaye, Scholer, Fierman, Hays & Handler, on behalf of unnamed broadcast clients, asked the FCC to permit stations to refuse explicit anti-abortion spots because they were indecent. Attorney Irving Gastfreund wrote, "Give us the authority to decline these graphic depictions when there's a reasonable risk of children being in the audience."**20** Counsel for Gillett Communications, owners of WAGA-TV5, Atlanta, also contacted the FCC for assistance, arguing that pictures of dead fetuses portrayed excretory activity, and therefore, were indecent.**21**

The Commission turned down both requests. In a letter to the two law firms, Mass Media Bureau Chief Roy Stewart stated it was not proper to restrict the time periods in which the spots could be aired. His letter went on to rule the content of the ads was not indecent. "Neither the expulsion of fetal tissues nor fetuses themselves constitutes 'excrement.'"[22]

However, the Bureau did note that in view of the interest previously shown by the FCC and Congress in serving "the special needs of children," stations would be within their right to broadcast a disclaimer prior to a spot the stations determined should not be viewed by children. The suggested wording was, "The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised."[23]

Becker was victorious in the August primary; just before the general election, he tried to buy time on WAGA to run a 30-minute program, Abortion in America: The Real Story. The time requested was late afternoon Sunday, November 1, following the telecast of an Atlanta Falcons football game. The station determined that the program contained footage that was indecent, and offered Becker time after midnight. WAGA's concern was a four-minute segment showing an actual abortion.[24] Becker filed a complaint with the FCC; the station went to Federal District Court.

In the FCC's response to Becker, dated October 30, 1992, the Mass Media Bureau cited an informal staff opinion from 1984 which held that the law prohibiting the broadcast of obscenity and indecency (Section 1464 of the U.S. Criminal Code) is an exception to Section 315 of the Communications Act. The Bureau wrote that it would not be unreasonable for WAGA "to rely on the informal staff opinion referred to above and conclude that Section 312(a)(7) does not require it to air, outside the 'safe harbor,' material that it reasonably and in good faith believes is indecent."25

In Atlanta, District Court Judge Robert Hall also ruled that WAGA had the right to move Becker's program to safe harbor after midnight. Hall went further in his decision, however, ruling the segment showing the actual abortion was in violation of Section 1464, and was indecent. He wrote, "This portion of the videotape depicts these activities and materials in a manner which is patently offensive according to contemporary community standards."26 Judge Hall specifically cited graphic depictions of female genitalia, and further concluded that images and words in the program would be understandable to children in the audience.

The court also took issue with the FCC for waiting until after Georgia's runoff election to respond to the July letter from WAGA's attorneys. Hall noted, "Failure to rule in a timely fashion thwarts the whole purpose behind the indecency prohibition: the protection of children."27

Becker appealed Hall's decision to the 11th Circuit Court of Appeals in Atlanta. When that appeal was denied, he filed a petition for extraordinary writ with Supreme Court Justice Anthony Kennedy, who has jurisdiction over the 11th Circuit. Kennedy denied Becker's petition on November 1;28 the candidate declined to purchase time for his program in the safe harbor period. In the general election two days later, Becker lost to Democrat Nathan Deal by a margin of 59 to 41 percent.29

Over the next two years, candidates in at least fifteen other states aired explicit anti-abortion ads.30 In 1993, Bailey was manager for an Ohio congressional candidate who campaigned against both abortion and homosexuality. The next year, Bailey returned as a candidate for Congress in Indiana's Republican primary. This time, two stations fought his attempt to use a particular ad that featured children singing in a cemetery contrasted with pictures of aborted fetuses. WHAS-TV, Louisville, restricted the spot to after 8:00 p.m.[31]; WTHR-TV, Indianapolis, rejected the ad as offensive. After consulting with Washington counsel, however, WTHR accepted the ad, but aired it only after 8:00 p.m.[32] In the May primary, Bailey lost to a state senator, 56 to 36 percent;[33] he claims the stations' decisions cost him campaign donations and possibly the election.[34]

The Issue of Indecency in Broadcasting

The principal law dealing with broadcast indecency is Section 1464, Title 18, of the U.S. Code, which reads: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."[35] Section 312(a)(6) of the Communications Act provides for revocation of a broadcast license for violation of Section 1464.[36]

While the FCC did make two attempts in the early 1970s to confront broadcast indecency, the case which established an actual definition was *FCC v. Pacifica Foundation* in 1978. In this case, the Supreme Court ruled the Commission has authority to regulate a broadcast that is indecent, but not obscene. The case developed from a broadcast of a comedy recording by George Carlin, featuring the "seven filthy words" not permitted on the air. The Court upheld the FCC's definition of indecency, specifically, "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and functions, at times of the day when there is a reasonable risk that children may be in the audience."37

The Commission adopted a loose policy of channeling indecent material to the period after 10:00 p.m., but in April 1987, issued warnings to three stations, one of which was another Pacifica outlet, for broadcasting indecent language. The FCC restated its decision to apply its generic definition of indecency to further actions, and warned stations that channeling indecent material to the period after 10:00 p.m. no longer guaranteed that material's permissibility.38

The concept of a "safe harbor" was created in the 1987 Reconsideration Order of an action against Infinity Broadcasting, one of the three licensees cited earlier that year. In this order, the Commission ruled that the period from midnight to 6:00 a.m. would constitute the safe harbor hours for indecent material.39 Several groups appealed the order; in 1988, the DC Court of Appeals ruled the FCC's safe harbor was arbitrary. The Appeals Court suggested the Commission initiate a rulemaking proceeding to determine an appropriate safe harbor, but noted that a set time had to be implemented. The Commission could not rely on case-by-case rulings.40

Before the Commission acted, however, Congress got involved by adding a 24-hour indecency ban to an appropriations bill via the "Helms Amendment."**41** The DC Court of Appeals stayed enforcement in January 1989, and in May 1991, ruled the 24-hour indecency ban unconstitutional. The court again ordered the FCC to create an appropriate safe harbor period, however, stating that some regulation would withstand scrutiny.**42**

Congress again intervened, directing the Commission in August 1992 to create a safe harbor of midnight to 6:00 a.m.**43** The FCC complied, and issued rules in January 1993.**44** Once more the policy was challenged, and the DC Court of Appeals granted a stay. In November 1993, the court turned back the FCC a third time, ruling there was no reasoned analysis supporting the channeling of indecent material to the first six hours of the day.**45** Pending further action by Congress or the Commission, the safe harbor for commercial stations currently is set at 8:00 p.m. to 6:00 a.m.**46**

The Issue of Censoring Political Broadcasts

Section 315 of the Communications Act was derived from Section 18 of the Radio Act. Washington Senator Clarence Dill wrote the language, including both the no censorship provision and a clause limiting the liability of broadcasters.**47** Because this liability exemption was deleted prior to the law's passage, questions have been raised over the years about responsibility for the content of political broadcasts.

In 1959, in the major case on defamatory political broadcasts, Farmers Educational & Cooperative Union v. WDAY, Inc., the Supreme Court ruled unanimously that WDAY had no right to censor a candidate's defamatory remarks. On the liability question, the justices ruled 5-4 in favor of the station, noting that to hold WDAY liable would have "the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee."**48**

Incitement to violence was the topic in 1972. J.B. Stoner, a white supremacist, ran for U.S. Senate from Georgia, using spots that called blacks "niggers" and accused them of coveting white women. The mayor of Atlanta feared violence, and that city's chapter of the NAACP asked the FCC to advise stations that they could decline to run Stoner's spots and not violate Section 315.**49** The Commission refused, citing the no censorship provision, and noting, "A contrary conclusion here would permit anyone to prevent a candidate from exercising his rights under Section 315 by threatening a violent reaction."**50**

When Stoner ran for governor of Georgia in 1978, the NAACP argued that "nigger" was an indecent term. However, the Supreme Court had just issued its ruling in Pacifica, and the FCC Broadcast Bureau determined that while the word "nigger" was offensive, it did not qualify as indecent as defined by the Court.**51**

Language was also the issue in 1980, when commercials for the Citizens Party used the word "bullshit." In responding to a censorship complaint against NBC Radio by candidate Barry Commoner, the FCC assured him that precedents were clear, and that no censorship was permitted.**52**

The Commission in 1984 informally addressed the subject of obscenity and indecency in political ads. The year before, Hustler magazine publisher Larry Flynt had announced his intention to run for president and to use X-rated film clips in his ads. Ohio Representative Thomas Luken asked the FCC how stations should react, and in a letter to Luken in January 1984, FCC Chairman Mark Fowler wrote that, in the opinion of the staff, "The no-censorship prohibition in Section 315 was not intended to override the statutory prohibition against the broadcast of obscene or indecent materials that is etched in Section 1464 of the Criminal Code."[53] Neither Flynt's candidacy nor his ads ever materialized, but, as noted earlier, the Luken Letter and Staff Memorandum were cited by the District Judge in the 1992 Becker ruling.[54]

The Issue of Reasonable Access

Congress first tried to guarantee access to federal candidates as part of a 1970 campaign reform measure, but that bill was vetoed by President Nixon.[55] The Federal Election Campaign Act, S. 382, was introduced in the Senate in January the next year, sponsored by majority leader Mike Mansfield of Montana, Rhode Island's John Pastore, and Howard Cannon of Nevada.[56] Title I of the bill had two purposes: one, to control what the Senate Commerce Committee called the spiraling cost of campaigning for public office; two, "to give candidates for public office greater access to the media so that they may better explain their stand on issues, and thereby more fully and completely inform the voters."[57]

In accordance with the stated purpose, the Committee added Section 101(c) to Title I, providing for revocation of a broadcast license under Section 312(a) of the Communications Act for willful or repeated failure to allow reasonable access to a station by any legally qualified candidate on behalf of his candidacy.[58]

The Senate passed S. 382 in December 1971; the House already had passed its own version, forcing both bills to a conference committee.[59] It was there that Section 101(c) was changed from any legally qualified candidate to candidates for federal elective office.[60] In addition, a conforming amendment was made to Section 315(a) of the Communications Act. The clause noting that licensees were under no obligation to permit candidates to use broadcast facilities was changed to read, "No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate."[61] That obligation now was imposed by the newly enacted Section 312(a)(7).

S. 382 became law February 7, 1972,[62] and within six weeks, the FCC issued guidelines for compliance. The Commission noted that no all-embracing standard could be set, but wrote, "The test of whether a licensee has met the requirement of the new section is one of reasonableness. The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section."[63]

When Congress repealed all of Title I of the FECA in 1974, the only section ruled still in effect was the one creating Section 312(a)(7).[64] The FCC continued to rely on broadcasters to determine what constituted reasonable access, but in 1978, decided to conduct an inquiry to ascertain if its policy was working for both broadcasters and candidates.**65** In a Report and Order issued that July, the Commission reaffirmed its position that the best way to balance the needs of candidates and broadcasters was to rely on the reasonable, good faith discretion of individual licensees.**66**

The first major challenge to the law and the FCC's policy came the next year. In October 1979, the Carter-Mondale Presidential Committee asked ABC, CBS, and NBC each to provide time in early December for a 30-minute program to be used by President Carter in conjunction with an announcement of his candidacy for reelection. All three networks refused, claiming it was too early to sell political time, and that program schedules would be disrupted by the abundance of candidates entitled to equal time. CBS suggested two five-minute blocks; ABC offered time in January 1980. The Commission ruled the networks' refusal to sell time failed to consider the needs of the candidate, and found all three in violation of Section 312(a)(7).**67** A week later, when rejecting the networks' petitions for reconsideration, the Commission suggested for the first time that broadcasters take an active role in discerning the need for political time throughout a campaign; the order described as "entirely appropriate" broadcasters contacting candidates to determine the probability of requests for access.**68**

Both the D.C. Court of Appeals and the Supreme Court upheld the FCC's decision.**69** Chief Justice Burger delivered the majority opinion for the high court, holding that Section 312(a)(7) created an affirmative, promptly enforceable right of reasonable access for individual federal candidates. In addition, the Court ruled the FCC has the right to determine whether a campaign has begun, though the Commission does not actually set a starting date.**70** The decision also gave formal endorsement to the Commission's "reasonable, good faith judgment" policy, while appearing, on the surface, to side with licensees: "If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance."**71** However, the Court noted the reasonable access law enlarges the responsibilities of licensees in the area of political broadcasting, and does not violate their First Amendment rights in the area of editorial discretion.**72**

The Commission did not issue any comprehensive guide in response to the Supreme Court ruling, but did feature the decision prominently in the section on reasonable access in the 1984 Political Primer.**73** Following the 1990 audit of thirty radio and television stations that revealed a number of violations of political broadcast rules,**74** the FCC adopted a Notice of Proposed Rulemaking, and, in December 1991, a Memorandum Opinion and Order codifying its political broadcasting rules.**75** But the Commission concluded that in the area of reasonable access it would not be practical to adopt formal rules; the FCC decided once again to rely on the reasonable, good faith judgments of licensees, and to determine compliance on a case-by-case basis.**76**

The Commission did offer some specific guidelines, including:

1. Broadcasters do not have to provide time within news programs;

2. Both program time and spot time must be made available during prime time periods;

3. The right of access during the periods outside the 45 days prior to a primary or 60 days prior to the general election will be determined by the Commission on a case-by-case basis;

4. Candidates may not be banned from access to time periods made available to other advertisers;

5. Stations may consider their broader programming and business commitments, the number of candidates in a particular race, potential program disruption, and the amount of time already sold to a candidate when providing reasonable access.[77]

In the 1992 reconsideration of its Opinion and Order, the Commission reaffirmed its guidelines in the areas of reasonable access.[78] Later that year, the National Association of Broadcasters asked the FCC to rule that broadcasters need not sell federal candidates program time in increments not usually made available to commercial advertisers or that a station does not usually program. The Commission's response was a request for public comment.[79] In the fall of 1994, the FCC granted the NAB's request, ruling that "broadcasters should be required to make available to federal candidates only the lengths of time offered to commercial advertisers during the year preceding a particular election period."[80]

The FCC Decision on Explicit Anti-Abortion Ads

As noted above, the debate over controversial anti-abortion spots did not stop on election day, 1992. On October 30, the same day the Mass Media Bureau responded to Becker, the Commission issued a Public Notice Request for Comments on the issues raised in both the Kaye, Scholer letter of July 1992, and Becker's October complaint against WAGA. "Specifically," the Commission wrote, "we seek comment on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. We also seek comment as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children."[81]

A coalition made up of all five major broadcast networks, major independents, the National Association of Broadcasters, and the Radio-Television News Directors Association called on the Commission to allow broadcasters to use their own judgments to determine what material is appropriate for their audiences.[82] But Daniel Becker said the FCC should make the decision, noting, "It would be too easy for a broadcaster to censor an unpopular political message under the guise that the message is indecent."[83]

The filing period ended in February 1993, but the Commission did not release its decision for twenty-one months--after a full set of primaries and general elections in both 1993 and 1994. The ruling upheld the Mass Media Bureau's decision that Becker's ads were not indecent. Citing the definition of indecency upheld sixteen years earlier in Pacifica, the FCC rejected claims that the ads depicted excretory functions: "Such an expanded definition arguably would encompass televised scenes of a character sweating, blowing his nose, or dressing a wound. . . ."**84** In determining that abortion was not a sexual activity simply because it relates to sex and reproduction, the Commission noted that an expanded definition would make any byproduct of sex--including life itself--indecent.**85**

Even though the ads were judged not indecent, the FCC gave stations the right to decide if the explicit pictures should be kept away from unsupervised children viewers. Quoting from the 1978 policy statement, the Commission noted that Section 312(a)(7) does not entitle a federal candidate to a particular placement of an ad on a station's schedule. The FCC, therefore, said it was "unwilling to infer that Congress, in affording federal candidates a limited statutory right to purchase reasonable amounts of broadcast time, intended to strip licensees of all discretion to consider the impact of political advertisements featuring graphic depictions of abortions on children in their audience."**86** It went on to point out that "licensee discretion does not constitute 'censorship' as that term is used in the Communications Act."**87** But the Commission warned broadcasters that a decision to channel these ads must be based on the pictures in question, not the political position of a particular candidate.**88**

An Analysis of the FCC Decision on Explicit Anti-Abortion Ads

As demonstrated by the previous discussion, the problem facing the FCC in this area was how to balance the rights of the public, the licensees, and the candidates. The Supreme Court in the WDAY case noted that Section 315 was put into law to foster political debate,89 while the Commission staff, in its memorandum accompanying the Luken Letter, stated, "Any limitation on the public's access to political debate would frustrate the purpose of the no-censorship provision."90

However, broadcasters point out that WDAY notwithstanding, they are the ones held accountable for what they air; the Commission's rights in this area were established in National Broadcasting Company v. United States in 1943,91 and broadcasters' duties were outlined in the FCC's Program Policy Statement of 1960: "Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public."92

Moreover, the anti-abortion political ads have raised questions of what other controversial issues may be treated in a similar manner. As noted, homosexuality was a topic in the campaign held prior to Ohio's special congressional primary election in March 1993. It is not difficult to imagine explicit ads dealing with capital punishment, or candidates using graphic commercials to discuss a person's right to die, or to be assisted in committing suicide, or to support animal rights. Any of these will create a dilemma for licensees.

Still, it is highly unlikely that Congress will change the laws concerning political broadcasting. Section 312(a)(7) applies only to federal candidates, meaning it expressly is designed to aid the very public officials who would have to change it. In addition, it is doubtful Section 315(a) will be modified to give broadcasters control over the content of political ads. Since before passage of the Radio Act, there have been reservations about the power broadcasters have. In 1926, Secretary of Commerce Herbert Hoover warned, "We cannot allow any single person or group to place themselves in position where they can censor the material which will be broadcasted to the public."**93**

Thus, the needs of the public must be foremost. The Communications Act applied the principle of the "public interest, convenience, and necessity" to broadcasting,**94** and the Supreme Court ruled in the 1969 Red Lion decision, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."**95**

Yet, while critics claim that there is little social scientific evidence to suggest that the psychological welfare of children is threatened by exposure to material deemed to be indecent,**96** the concerns of parents are an important consideration. In Ginsberg v. New York, (1968), the Supreme Court established that the government has an interest in protecting parents' rights to rear their children,**97** and, as the Court noted in the 1972 Wisconsin v. Yoder decision, "This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."**98**

Justice Stevens wrote in the Pacifica decision, "Broadcasting is uniquely accessible to children, even those too young to read,"**99** while the DC Court of Appeals also noted in the first

Action for Children's Television case, "Channeling is designed to protect unsupervised children."100 It can be argued that no one's interest is served when children are subjected to ads of the type described.

Therefore, only a compromise position could balance the rights of viewers, broadcasters, and candidates, and the Commission achieved this compromise with its 1994 decision. As noted in the ruling, "The public's right to have access to political speech is not impeded by this policy."101 Critics may argue that this ruling favors broadcasters, but on the contrary, it permits each side certain flexibility under the law, while requiring all parties to take responsibility for what is broadcast. Candidates who fear that controversial advertising will be banished to the period after midnight will continue to have access to some of the most popular times of the broadcast day. The FCC reiterated its policy "that licensees should afford access to federal candidates in prime time, when access to voters is greatest."102

Michael Bailey claims that channeling spots to the period after 8:00 p.m. restricts the ability of a candidate to reach potential voters; he also notes that prime time spots are the most expensive.103 But if the rights of the viewers truly are paramount, then candidates must accept that treatment of a particular issue at certain times will require a different type of ad. In addition, broadcasters who fear reproach from their audiences should be able to assure them that certain themes in political advertising will be aired only when adult programming is offered, while viewers who do not want their children exposed to particular types of spots should know at what times those spots will not air.

Still, the vagaries of the decision will leave broadcasters with questions. The Commission neither requires nor encourages licensees to channel graphic political ads. That decision, once again, is left to the reasonable good faith efforts of broadcasters. In warning stations to avoid political reasons for moving ads, the FCC cites the CBS v. FCC case: "A broadcaster's decision to channel an advertisement 'may not be invoked as [a] pretext[] for denying access.'"**104** Moreover, the Commission states that channeling of explicit anti-abortion ads must relate "to the graphic imagery in question and not to any political position the candidate espouses."**105** How a licensee proves it has made a proper decision is not addressed by the Commission. Bailey argues that stations, not candidates, should incur the burden of appeal.**106** In most ways, they will.

Conclusion

This paper has examined the questions faced by the Federal Communications Commission in the controversy over the use of explicit anti-abortion ads by political candidates. The issues of indecency and safe harbor, censorship of political advertising, and reasonable access have been reviewed; after considering the rights as well as the needs of the viewers, broadcasters, and candidates, the position is advanced that permitting stations to channel these ads to a period when fewer children are viewers best serves both the public interest and the political process.

Michael Bailey's explicit anti-abortion spots broke new ground in the area of political advertising and put television stations in the awkward position of broadcasting material over which they had no control. The Commission was slow to respond to the controversy, but in the end issued a decision that serves viewers, broadcasters, and candidates. It did so by making this issue not one of content, but of access, particularly access to children. In light of the FCC's ruling, the comment of one television station manager is appropriate: "Why subject children to these spots? They can't vote."107

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NOTES

1. 47 U.S.C. § 315 (1988).

2. 47 U.S.C. § 312(a)(7) (1988).

3. 47 U.S.C. § 315(a) (1988).

4. In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, Memorandum Opinion and Order, 9 FCC Rcd. 7638, 7642 (1994).

5. Michael E. Bailey, Christian Politics: Rocking America (Georgetown, IN: Bailey Books, 1993), 33.

6. ABC News. Nightline, 31 August 1992.

7. Bailey, Christian Politics, 36-37.

8. Choice A/B, Georgetown, IN: Bailey for Life for Congress, 1992.

9. Abortion is Evil, Georgetown, IN: Bailey for Life for Congress, 1992.

10. Joe Flint, "Furor Over Anti-Abortion Political Ads," Broadcasting, 27 April 1992, 41.

11. WISH-TV, News 8, 5:00 p.m., 20 April 1992.

12. WISH-TV, News 8, 5:00 p.m., 20 April 1992.

13. John R. O'Neill, "Anti-Abortion Ads Propel Bailey in 9th District Republican Race," Indianapolis Star, 6 May 1992.

14. Life or Death, Georgetown, IN: Bailey for Life for Congress, 1992.

15. Bailey, Christian Politics, 60.

16. Hitler, Georgetown, IN: Bailey for Life for Congress, 1992.

17. Kevin Morgan and Tom Chiat, "Victorious Hamilton Could Be In Line for New Job," Indianapolis Star, 4 November 1992.

18. WISH-TV, News 8, 11:00 p.m., 3 November 1992.

19. Ellen Whitford, "Abortion: Both Sides Galvanized by Ads," Atlanta Journal and Constitution, 8 July 1992.

20. Doug Halonen, "FCC Unlikely to Halt Graphic Ads," Electronic Media, 10 August 1992.

21. Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Vincent A. Pepper, Counsel, Gillett Communications, and Irving Gastfreund, Kaye, Scholer, Fierman, Hays & Handler, 7 FCC Rcd. 5599 (1992).

22. Letter to Pepper and Gastfreund, 7 FCC Rcd. 5599, 5600 (1992).

23. Letter to Pepper and Gastfreund, 7 FCC Rcd. 5599, 5600 (1992).

24. Gillett Communications v. Daniel Becker, 807 F. Supp. 757 (N.D. Ga 1992).

25. Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Daniel Becker, 7 FCC Rcd. 7282 (1992).

26. Daniel Becker, 807 F.Supp. 757, 763.

27. Daniel Becker, 807 F.Supp. 757, 761.

28. Joe Flint, "FCC Drifts Toward Safe Harbor for Abortion Ads," Broadcasting, 9 November 1992, 48.

29. "Election Results," Atlanta Journal and Constitution, 5 November 1992.

30. Keith Glover, "Campaigning Crusaders Air Graphic Anti-Abortion Ads," Congressional Quarterly, 26 September 1992, 2972.

31. David Goetz, "WHAS Limits Bailey's Anti-Abortion Ads to Hours After 8 P.M.," Louisville Courier-Journal, 31 March 1994, 1B.

32. Steven Click, National Sales Manager, WTHR-TV, telephone conversation with author, 28 March 1995.

33. Mary Dieter, "Leising's Old-Fashioned Campaign Beat Bailey's 'Offensive' Tactics," Louisville Courier-Journal, 5 May 1994, 4B

34. Michael Bailey, "Censorship by Media Elites Will Ultimately Threaten the Republic," Federal Communications Law Journal 47 (1994): 159-163.

35. 18 U.S.C. § 1464 (1988).

36. 47 U.S.C. § 312(a)(6) (1988).

37. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

38. In re Pacifica Foundation, Inc., Memorandum Opinion and Order, 2 FCC Rcd. 2698 (1987).

39. In re Infinity Broadcasting Corp.of Pennsylvania, Memorandum Opinion and Order, 3 FCC Rcd. 930 (1987) (reconsideration order).

40. Action for Children's Television v. FCC, 852 F.2d. 1332, 1344 (D.C. Cir. 1988).

41. Pub. L. No. 100-459, §608, 102 Stat. 2228 (1988).

42. Action for Children's Television v. FCC, 932 F.2d. 1504, 1520 (D.C. Cir. 1991).

43. Pub. L. No. 102-356, §16(a), 106 Stat. 949, 954 (1992).

44. In re Enforcement of Prohibitions Against Broadcast Indecency in 18 USC §1464, Report and Order, 8 FCC Rcd. 704 (1993).

45. Action for Children's Television v. FCC, 11 F.3d. 170 (D.C. Cir. 1993), vacated and reh'g granted en banc, 15 F.3d. 186 (D.C. Cir. 1994).

46. Joe Flint, "Indecency Rules Under Fire in Courts, at FCC," Broadcasting & Cable, 1 March 1993, 44.

47. 67 Congressional Record 12502 (1926).

48. Farmers Educational & Cooperative Union v. WDAY, Inc., 360 U.S. 525, 529 (1959).

49. Letter from Ben F. Waple, Secretary, FCC, to Lonnie King, Atlanta NAACP, 36 F.C.C. 2d, 635, 636 (1972).

50. Lonnie King, 36 F.C.C. 2d, 635, 637 (1972).

51. Letter from Wallace E. Johnson, Chief, Broadcast Bureau, to Julian Bond, Atlanta NAACP, 69 F.C.C. 2d, 943, 944 (1978).

52. In re Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, 87 F.C.C. 2d, 1, 5 (1980).

53. Letter from Mark S. Fowler, Chairman, to Rep. Thomas Luken, 19 January 1984.

54. Daniel Becker, 807 F.Supp. 757, 763 (1992).

55. Senate Report (Commerce Committee), to accompany S.382, No. 92-96, (1971).

56. Senate Report (Rules and Administration), to accompany S.382, No. 92-229, (1971).

57. Id.

58. Id.

59. Senate Conference Report No. 92-580, (1971).

60. *Id.*

61. *Id.*

62. P.L. 92-225, *reprinted in* U.S.C.A.A.N. (1972).

63. Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 F.C.C. 2d, 510 (1972).

64. P.L. 93-443, Title II § 205 (b), reprinted in U.S.C.A.A.N. (1974). The purpose behind the Federal Election Campaign Act Amendments of 1974 was to "renew and reemphasize the disclosure provisions of the Federal Election Campaign Act of 1971." *See* Senate Report (Rules and Administration), to accompany S.3044, No. 93-689, (1974). Historical and Statutory Notes for 47 U.S.C.A. § 312 (West 1988) explain that P.L. 93-443, Title II § 205 (b) "has been construed as not repealing the amendment to this section . . .[of P.L. 92-225]."

65. *In re* Commission Policy in Enforcing Section 312 (a) (7) of the Communications Act, 68 F.C.C. 2d, 1079 (1978).

66. *Id.*

67. *In re* Complaint of Carter-Mondale Presidential Committee, Inc., 74 F.C.C. 2d, 631 (1979).

68. *In re* Complaint of Carter-Mondale Presidential Committee, Inc. (petition for reconsideration), 74 F.C.C. 2d, 657 (1979).

69. CBS v. FCC, 629 F. 2d 1 (D.C. Circuit, 1980); CBS v. FCC, 453 U.S. 367 (1981).

70. CBS v. FCC, 453 U.S. at 388.

71. *Id.* at 387.

72. *Id.* at 394-396.

73. FCC, *The Law of Political Broadcasting and Cablecasting: A Political Primer 1984 Edition*, (1984).

74. Mass Media Bureau Report on Political Programming Audit, 68 Rad. Reg. 2d (P&F) 113 (1990).

75. *In re* Codification of the Commission's Political Programming Policies, 7 FCC Rcd. 678 (1991).

76. *Id.*

77. *Id.*

78. In re Codification of the Commission's Political Programming Policies (reconsideration), 7 FCC Rcd. 4611 (1992).

79. In re Request for Declaratory Ruling of National Association of Broadcasters, Staff Ruling and Request for Public Comment, 7 FCC Rcd. 6880 (1992).

80. In re Request for Declaratory Ruling of National Association of Broadcasters, Memorandum Opinion and Order, 7 FCC Rcd. 5778, 5779 (1994).

81. In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, 7 FCC Rcd. 7297 (1992).

82. Harry A. Jessell, "Broadcasters Oppose Widening Indecency Net," Broadcasting, 1 February 1993, 54.

83. Jessell, "Broadcasters Oppose," 54.

84. In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, supra note 4.

85. Id.

86. Id.

87. Id.

88. Id.

89. WDAY, 360 U.S. 525, 529 (1959).

90. FCC Staff Memorandum on Section 315 and Obscene or Indecent Material, 6 January 1984, 5, accompanying Luken Letter, supra note 53.

91. National Broadcasting Company v. United States, 319 U.S. 190 (1943).

92. Commission en banc Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7291, 7295 (1960).

93. 67 Congressional Record 5484 (1926).

94. 47 U.S.C. § 303, 307, 309 (1988).

95. Red Lion Broadcasting Co. Inc. v. FCC, 395 U.S. 367, 390 (1969).

96. Edward Donnerstein, Barbara Wilson, and Daniel Linz, "On the Regulation of Broadcast Indecency to Protect Children," Journal of Broadcasting & Electronic Media 36 (winter 1992): 116.

97. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

98. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

99. Pacifica, 438 U.S. 726, 749 (1978).

100. ACT I, 852 F.2d 1332, 1340 (D.C. Cir. 1988).

101. In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, supra note 4.

102. Id.

103. Bailey, "Censorship by Media Elites," 162.

104. In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, supra note 4.

105. Id.

106. Bailey, "Censorship by Media Elites," 162.

107. Paul Karpowicz, interview with author, 12 February 1993.

'LIVING LAW' IN THE NEWSROOM:

A Study of Social Influences

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presented to

the Law Division
of the Association for Education in Journalism
and Mass Communication

August 10, 1995
Washington, D. C.

'Living Law' in the Newsroom: A Study of Social Influences

In much of the scholarship of journalism law, a curious set of assumptions prevails: That journalists know the relevant law, that journalists obey the relevant law, and that journalists will use the law to guide them through legal decision-making in the newsroom. These assumptions have grown out of the traditional conception of legal scholarship, which centers on legal institutions and the work of the court system. Scholars analyze the intellectual roots of doctrine and the patterns of logic in court decisions and engage in a variety of normative or deductive exercises. These discussions, especially as they concern the behavior expected as a result of legal rule-making, assume that the law-making institutions influence, in important ways, the behavior of a significant number of journalists, their organizations, and the people they deal with. As Pritchard notes (1986), if that assumption is not valid, then media-law research adds little to the understanding of mass communication behavior.

This area of research lies somewhere between paradigms in mass communication research, yet certainly within its overall domain. The traditional paradigm of media law has been so narrowly drawn that the research, while insightful in many important respects, has failed to consider the place of media law in the larger processes and effects of mass communication. Thus an expanded research paradigm is warranted.

This is not to imply that the bridging of traditional, humanistic, normative research and social-science theory and methodology is novel. On the contrary, much work with this approach has been undertaken. The "law and society" movement in legal research has won many adherents in communication law over the last fifteen years. But the merger is by no means easy, or complete. In traditional legal studies we see an adherence to the casebook, which centers the thinking on society's formal lawmaking elites and institutions. Even the early proponents of social-sceince methods, such as Gillmor and Dennis (1975), did not substantively expand the paradigm; they recommended quantitative methods to study the behavior of judges and juries. But what about those vast areas of social behavior in which the law is played out -- but not in a courtroom? Macaulay (1984) found generally that if legal rules have any influence at all on social behavior, the influence tends to be subtle and indirect. There is no reason to assume, Pritchard adds (1986), that legal rules can provide a sufficient explanation for journalistic behavior: "It is knowledge about how the world really works, rather than opinions about how it could or should work, that leads to a more profound understanding of how law and society influence each other" (p. 52).

The purpose of this project, then, is to suggest -- and implement -- a conceptual framework for the study of mass communication into which media law can be placed, in the hope that the integration can enhance not only the social scientist's understanding of the values that drive media processes but also the legal scholar's appreciation of the "realities" surrounding formal lawmaking. In an effort to test and illustrate this bridged paradigm, the study endeavors to measure empirically one aspect of journalists' legal behavior: the legal system's impact on the decision-making process when legal problems arise.

Conceptualization

This study approaches journalism law from a "law and society" perspective, which finds its roots in the work of Justice Oliver Wendell Holmes, who in the late nineteenth century advocated a system of jurisprudence that relied on more than the internal logic of the law and the dictates of precedent (Friedman & Macaulay, 1977). Holmes, soon joined by Professor Roscoe Pound, believed that the law should be informed by empirical findings as to how the legal process works in society. This implies, for example, an examination of the factors that influence society's compliance with the law, and of the social, external factors that influence the internal processes of the judiciary.

This perspective suggests the study of a "gap" between a formal, by-the-book understanding of the way the law should work and an informal, empirical accounting of how the law works. The examination of both sides of the gap is important: Legal actors often do act as if the formal model "works," and the law, whether statutory, administrative or judicial, is nearly always based on the assumption that the formal model will work. Even those legal actors who realize that a different, informal model is more realistic and accurate would still like to believe the legal system can be improved to more closely reflect the formal model (Abel, 1973). Perhaps most importantly, the "legal realists" argue that the formal model does influence legal and social behavior, but it is only one of a larger group of social influences on behavior.

Galanter (1974) has outlined the tenets of the formal model in the most general sense: Governments are the primary locus of legal controls; the legal rules in a society form a system that is coherent, with interrelated parts; the legal systems are centered around courts, which interpret and apply (but do not make) the law; the rules represent general social preferences; the behavior of legal actors conforms to rules; and a body of normative standards, such as a constitution, provides the centerpiece of the legal system. For decades legal sociologists have set about exposing the gaps that divide these tenets from their empirical findings.

A similar "gap" is strongly suggested in journalism law. The rhetoric and tradition of the First Amendment have nurtured and sustained a formal, liberal model of freedom of expression that is probably more visible than a formal model is in most areas of American law. It therefore invites comparisons to the "living law." And while most Americans have given some thought to the content and effects of American mass media, the processes of news gathering and news production, which are affected by the formal law of the mass media, are relatively unknown. The search for signs of a gap between the formal law and the living law, in the journalistic situations described in this study, comprises an underlying theme for this study.

Legal sociologists have examined gaps in several major legal areas such as compliance with the law. Why do people obey the law? Tyler (1990) has offered a comprehensive framework for the study of compliance that focuses on citizens' attributions, and divides them into two perspectives: the instrumental and the normative.

Instrumental thinking about compliance is more traditional; it involves judgments about personal gains and losses that will result from obedience or disobedience of the law. Instrumentalists consider the likelihood of getting caught and the likely severity of the punishment. Antunes and Hunt (1973) proposed a model in which severity of punishment and certainty of apprehension are weighed as deterrent factors for different types of crime. They found that certainty of capture was more influential than severity of punishment, but that the combination of high certainty and high severity of the penalty had the greatest deterrent effect. Other researchers had studied deterrence according to the type of crime contemplated. Chambliss (1967) found that perpetrators of "instrumental" crimes (crime as a means of achieving another goal) are easier to deter with sanctions than those who commit "expressive" crimes (crime as an end in itself, such as a crime of passion). He found also that the perpetrator's degree of commitment to crime as a way of life has influence on deterrence: The higher the commitment, the less likely the deterrent force of sanctions.

Journalists are rarely being tried for crimes in the formal sense, but they are required to follow laws whose violation may result in litigation. The deterrence studies therefore still have implications for journalists. For example, the acts journalists commit that run afoul of the law, such as refusal to name a confidential source when subpoenaed to do so, or publication of material that is defamatory and untrue, or disclosure of embarrassing private facts about someone, are typically evidence of a high level of commitment to the work of journalism; the journalist simply went a little too far. This would suggest little impact of sanctions except that, if Chambliss's findings do apply, the instrumental nature of the violations (as opposed to expressive) would make journalists more susceptible to sanctions, thus countering the "high commitment" effect.

Tyler and others have argued, however, that the instrumentalist focus on deterrence misses most of the important dynamics that explain compliance with the law. Tyler instead advocates study of the normative perspective, which examines the influence of what people regard as just and moral, as opposed to what people think is in their self-interest. Normative commitment to compliance arrives through two channels: legitimacy and morality. Legitimacy is externally driven -- we grant to legal authorities the right to govern our behavior through their laws. Morality is an internalized obligation to obey a law because we happen to agree that it is morally justified. Tyler asserts that in a democratic society, the legal system cannot function if it can influence people only by manipulating rewards and costs (their instrumentalist attributions). In order to win longer-lasting and stable compliance, leaders' action must be consistent with most people's views about right and wrong.

Thus a gap of sorts seems to emerge in the study of compliance, in which other social determinants may be more influential upon compliance than formal sanctions are. The formal legal system relies on sanctions, of course, because it is able to control the creation and administration of formal sanctions and unable to control as well the citizens' granting of legitimacy and citizens' individual sense of morality. The formal model predicts that when a law is adopted or changed, legal actors affected by the change will adjust their behavior to comply, or risk penalties.

But Tyler is not alone in arguing that penalties are not the primary source of compliance. Schwartz and Orleans (1967) had found twenty years earlier that appeals to conscience minimize resistance to complying with income-tax laws, and that threats of punishment can actually increase resistance to such laws. Skolnick (1968) offered a broader conception of compliance, which Tyler's complements. Skolnick too reviewed research literature and concluded that increasing penalties is not a good predictor of compliance. He found that not only are sanctions often too vague and distant to be considered in the real-time decision to commit a crime, but also that "deviants" develop a shared set of definitions that make sanctions even less relevant, and that the activity sanctioned is often regarded as compelling in contexts apart from the legal context. Skolnick urges that disobedience be studied in a "total context" that includes all the social factors, legal and extralegal, that might influence a decision to obey a certain law. It is the "total context" that helps explain the gap between formal lawmaking and informal law-obeying. Macaulay has written (1984) that the law "matters" in American society, but "its influence tends to be indirect, subtle and ambiguous" (p. 155). According to Macaulay, people tend to act according to either common sense (the normative perspective) or self-interest (the instrumentalist perspective), but with only a vague or inaccurate sense of the formal law and legal processes. The microsocial determinants comprising Skolnick's "total context" can explain why this is so.

This brings us to this study's conceptual model of social determinants of journalistic decision-making in legal situations. This framework begins with an adaptation of a more comprehensive model of influences on media content, by Shoemaker and Reese (1991). The overall theoretical goal for this model is to learn the relative importance of each determinant in influencing a particular journalistic behavior and thus influencing the content of the media. The present model proposes seven social determinants of legal decision-making:

- Individual -- the personal background and style of moral reasoning that each journalist brings to her work;
- Small Group -- the influence of peers and informal social constraints;
- Organizational -- company policies and other formal or structural constraints;
- Competition -- reaction to (or anticipation of) the work of competing media;
- Occupational -- the influence of training, norms, professional codes of ethics and other notions of professionalism;
- Extramedia -- consideration of news subjects, news sources and audiences;
- Legal -- the influence of law, in both formal and informal constructions.

Shoemaker and Reese suggest that there exists a "hierarchy of influences" on media content, and one of the key research questions here is whether such a hierarchy exists in influence upon legal decision-making (which in itself can be viewed as a subset of antecedents of media content). If the structure of the model is somewhat complex, the dynamics of the model are no doubt even more so. As Figure 1 suggests, there is a body of values that is grounded in social responsibilities and legal principles, but those values do not necessarily *directly* influence a journalist's decision. For example, a reporter being subpoenaed to reveal her sources may realize that to refuse would probably result in a contempt-of-court finding and legal punishment. It could be, however, that the Extramedia influence (of her news source) and Occupational influence (the peer respect often engendered by such refusal) will override the Legal influence and result in her civil disobedience. In another case, the reporter may be assured by the station's attorney that a story with embarrassing private facts about a politician will not put her or her station at legal risk, but her Individual respect for privacy and Extramedia consideration of her news subject may override the Legal influence again.

The model also allows for a legal decision that can be supported by every one of the determinants in the model simultaneously. Such a confluence is rare, however, because a legal dilemma, almost by definition, involves conflicting values and rights.

The model finds considerable support from the broader literature on compliance. In an experimental setting Berkowitz and Walker (1967) found that people changed their views (on compliance) more often to follow their peers' changes in attitude than to follow a change in the law itself. Tyler found too that social groups are a key influence upon compliance. The dynamic can occur instrumentally (when one considers whether peers or family will reject her as a result of a decision) or normatively (when one looks to her reference group to consider whether behavior is morally appropriate). In the field of journalism, the early work of Breed (1955) still commands great respect among media sociologists. He found that journalists act according to their organizations' needs and values, which they learn through the informal, osmotic process of newsroom socialization. Whether we call these small-group, occupational or organizational norms, the norms do serve to influence behavior. As an example, in *Florida Star v. B.J.F.* (1989), the U.S. Supreme Court affirmed the media's right to report the name of a crime victim -- even if the victim's attacker was still at large and the victim was desperately seeking privacy. Using the formal model, one might speculate (as several law journals articles did -- see for example Kramer, 1989; Hockwar, 1990; Kirtley, 1991; and Stevens, 1991) that journalists would take advantage of the Supreme Court's refusal to punish publishers of victims' names. But more the opposite trend has occurred since the decision (Arant, 1991). If, for whatever reason, the newsroom or occupational culture communicates that reporting victims' names is now taboo, there will be little of that activity in the media. The two determinants combined to counteract the result the formal model had suggested.

Also, in the area of libel and privacy: Why do journalists engage in such risky behavior that a minor misstep could bring about a lawsuit? Skolnick's "shared set of definitions among the deviants" helps explain. Some journalists take their "watchdog on the government" role so seriously (an occupational determinant) that they seek creative, aggressive modes of news gathering and reporting, knowing they must operate close to the edge of legality in order to discover important information. According to Skolnick, in such situations "sanctions are relevant but not necessarily determinative in forestalling the (illegal) activity" (p. 243).

Yet another example can be seen in the context of corporate compliance. Here the legal actors are owners and managers instead of lower-ranking news workers and editors, but their decisions are law-related just the same. Stone (1975) found that corporations do not always respond to lawsuits or legal sanctions in ways the formal model would predict. If the penalty amount is a paltry portion of the corporate business; if there is little certainty of enforcement of a law or court order (therefore suggesting compliance would be a waste of resources); or if fines or judgments are no great shame in a particular business community, then compliance is not likely. These conditions have obvious applications in the media industries. Among larger media organizations, there is a certain sense of noble suffering associated with a lawsuit, especially if it is filed by a high-profile public figure. As Bezanson et al. found (1987), the issue of the media organization's accuracy or inaccuracy in the work that brought on a libel suit is usually buried among the legal flurry over the "fault" issue, so the organization is rarely embarrassed before its peers. For organizations as well as individuals, then, there is "total context" outside the law to be considered in gauging compliance.

In Tyler's conceptualization, compliance depends upon legitimacy and morality (from the normative perspective) and deterrence (from the instrumental perspective). The mass-communication model presented here also complements Tyler's framework. Occupational and Organizational norms influence perceptions of legitimacy. Individual-level determinants, as well as some Extramedia factors, help influence perceptions of morality. Instrumentalist decisions are influenced not only by legal forces but by Organizational needs (effects on company revenue, e.g.) and Small-Group factors (the threat of ridicule, e.g.) as well. Whereas legitimacy, morality and deterrence are the outcomes that lead to compliance, the determinants in the model represent the means to those outcomes.

Dimensions of the Concept

So how do we identify and measure dimensions of the Legal influence to reflect this legal-realist approach? The foregoing discussion immediately suggests a dimension for empirical inquiry: an informal-formal dimension of compliance with media law.

In the formal legal model, we would see a journalist cultivating a body of knowledge about media law, or perhaps citing a recent Supreme Court decision, or state statute or local court order, as the principal reason for engaging in or rejecting a certain journalistic strategy. Laws that were intended to be observed by journalists are in fact enjoying not only recognition but compliance. And despite the legal-realist's tendency to box this notion into a corner of unrealism, there was evidence, in this study's face-to-face interviews with daily journalists, of the use of the formal law. A features writer at a medium-sized paper explained how her knowledge of libel law gives her confidence in dealing with angry sources and subjects:

> We had a restaurant owner who didn't like the review I did a week ago, and he talked with a lawyer, but I'm sure the lawyer just said (shrugs her shoulders). I think I feel very confident that it is so hard to prove libel, that it just isn't a big deal.

Other journalists feel they need a working knowledge of the law if a confrontation on the job should arise. Several reporters cited the need to stay abreast of courtroom-access rulings and open-meetings laws, and one sports reporter who covers university athletics described the importance of legal knowledge on his beat:

> The legal issue at the university is always over open records. You have to know open records law backwards and forwards. The university, as you know, does a good

> job of trying to hide whatever it can. But it's there. You just have to know how to get it.

But the anecdotal evidence of *informal* law is even more plentiful, and certainly more diverse. Here the impact of the law is indirect at best -- and at times nonexistent. For example, most of the journalists saw themselves rarely becoming involved directly in a legal dispute. In a landmark piece of legal-sociology research, Felstiner, Abel and Sarat (1981) discovered distinct stages of "naming, blaming and claiming" that not only precede legal action but often preclude formal legal action altogether. Some of the journalists interviewed explained that legal problems can be resolved by informal discussion. An education writer explained how it works for her:

> There have been a couple of times where I've wanted information, and I've almost gotten to the point of asking under the open-records thing (Wisconsin Open Records Law), but it usually has not come down to that. This (school-district) attorney, even though he goes by the book, is usually somewhat reasonable. I just argue with him a lot instead of going to the courts, or going through our attorney. And it works, because I know him. I've worked on this beat for four years, so we have sort of a relationship. He gives me a tough time, but then he usually gets me what I want.

An even more common "informal" approach to the law seems to be reliance on others who have knowledge of the formal law. Most media companies retain an attorney or law firm, to be called in when legal questions arise. Even the smallest newspapers don't feel the need to stay current on legal news; the small-town managing editor explained his routine when a legal problem arises:

> The first thing I do is call the WNA (Wisconsin Newspaper Association) hotline. I don't know the law; it

> changes all the time. I just know the number of the hotline. You give them a call, they fax you an opinion. I know it's different at (a larger paper where he used to work). We would sit there and the attorneys would give brown-baggers (law seminars over lunch) and semi-annual conferences. But it's different up here.

A few of the journalists described a situation of informal impact that had its origins in the formal legal system: a previous lawsuit against the media outlet. It changes the degree of Legal influence, it seems, but not in ways that necessarily increase formal knowledge or compliance. The impact still seems indirect and informal. A television reporter described his station's experience:

> At least once a week we're conference-calling the lawyer, or he comes out to look at some video. You see, this station was sued once, many years ago, going in on a drug bust and photographing people who weren't arrested. I guess they had a big out-of-court settlement. So now we're very -- if there is any remote possibility we could be getting into some legal problems, we get the lawyer on the phone.

Others take a less defensive, and certainly less careful attitude, about the law. The education reporter seemed to know vaguely that printing the names or likenesses of children without the permission of their parents could make the newspaper liable in an invasion-of-privacy action (Wisconsin Privacy Act), but it seemed unimportant. Her decidedly instrumentalist reading of the issue:

> Some principals give me a hard time about going in to a school and just talking to the kids. They say we should get the parents' permission, and maybe legally we should. But I always feel I should be able to go in and talk to kids. I don't really worry about if I should get parents' permission. It's the same with taking their picture, I think legally you're supposed to get their parents' permission.

> But I don't worry about that, because I've had very few complaints about it.

Still others are not quite sure what comprises a legal situation. Asked to describe a recent legal discussion in the newsroom, a 23-year-old television producer recalled a situation that involved the ethical principle of fairness, but no substantive legal question.:

> The other day we covered a story about the EMT service to the HoChunk bingo casino. In gathering the story we hadn't especially gotten HoChunk tribal reaction. We attempted to talk to one of their lawyers and he wasn't available. We did talk to the tribal chairman, but not on camera. We really went around and around (in the newsroom), and we weren't going to run the story if we didn't have the other side. Now I don't know if that could have been listed as a legal thing?

Law and Ethics

Many of the face-to-face respondents also noted the close, often confusing relationship between law and ethics, and ethics seemed to have a presence in many of the manifestations of informal law. The legal system concerns itself with a relatively small portion of the entire universe of human behavior. A far greater portion occupies the realm of the moral system: those thoughts and acts which people might consider morally right or wrong. Generally, the law can permit a broad array of moral transgressions. This relationship is especially conspicuous in journalism. While most law is grounded in moral reasoning, the unique authority of the First Amendment of the U.S. Constitution often permits American journalists to be morally irresponsible. It seems reasonable to propose that the legal system can influence a journalist to make an ethically careless, insensitive decision in some circumstances and an ethically careful, sensitive decision --

based on consideration of moral values -- in other circumstances. In this way the legal system is much like the other social influences in the conceptual model: sometimes playing the angel on the shoulder, sometimes the devil.

The closeness of law and ethics was not lost on the respondents. The young television producer who was not sure whether the bingo story involved a legal question pointed out later that moral sensitivity will often protect a journalist from legal trouble.

> I don't even know if that was a legal question, but if you favor a (course of action) morally, it's not necessarily a legal question. We all knew that morally, professionally, we needed to run both sides of the story.

Moral caution will often guide journalists to legal correctness, but will the legal system induce the best moral solution? Other journalists described the tremendous moral latitude the First Amendment offers. A features writer told of her reluctance to use her legal rights to the fullest extent:

> We interview people, then they freak out and they don't want the story in the paper. I have this constantly. They are not able to sleep, and having anxiety attacks, and all kinds of things, and they'll call up and demand that we not use the story. In this particular case last week, they called the night it was supposed to be used. It's hard. We have the right to use it, but at the same time you want to be decent about it.

If the ethical issue is very closely related to the legal issue, the force of the law can become the dominant influence upon the decision -- sometimes at the expense of all other considerations. The news executive at a metropolitan newspaper explained why he rated the Legal influence near the top of his own "hierarchy of influences":

> The law is the easiest factor to blame. You know, "The

> law says. . ." or "Our attorney says we have to, so therefore this is what we will do or won't do." The law provides the easy answer.

That perspective assumes, however, a formal legal model is alive and working -- that the journalists involved will know enough about the law to comply immediately and correctly. As the literature of legal sociology and the face-to-face respondents suggest, however, that is not always the case.

Operationalization and Methodology

Two research methods were used in this study, both involving interviews with journalists. The first procedure involved a telephone survey; the second involved the follow-up, face-to-face interviews (during which the observations above were offered). Both methods were designed and structured to reflect the fundamental question in the theoretical model: Under what conditions and influences is a certain decision made in a legal situation, and is there a hierarchy of influences?

A sampling frame of journalists in southern Wisconsin was developed with the cooperation of (nearly all) news executives at television and radio stations with news operations and daily and weekly newspapers of general circulation. The probability sample of 118 was stratified, to ensure equal numbers of print and broadcast journalists, and equal numbers of journalists working in large news organizations and medium-to-small organizations.[1]

The second phase of the study departed from the quantitative orientation: Twenty of the 118 journalists, again selected randomly, later took part in in-depth, face-to-face interviews. The intent was that these interviews would provide clarification or illustration of the concepts and relationships being tested quantitatively.

The telephone interview schedule began with the presentation of three hypothetical scenarios. In the first, a news reporter and photographer sneak into a nursing home (on which they are doing an investigative piece, and from which they had been formally denied access) by posing as janitors. The second scenario concerns whether to publish (or broadcast) the name of a teen-age suspect in a highly-publicized murder in the community. In the third situation, a mayoral candidate is the target of allegations, lodged by disgruntled former employees, of improprieties. A news outlet decides to report the allegations without verifying them or presenting the candidate's side of the story.

The first survey question after the telling of each scenario is whether the journalist's behavior is acceptable to the respondent, on a numerical rating scale of one to ten, where one is utterly unacceptable and ten is perfectly acceptable. This rating of acceptability, especially when it is combined across all three scenarios, becomes the key dependent variable in the study.

Of greater concern in this study than the perceived rightness or wrongness of a particular decision, however, are the primary independent variables that comprise the hierarchy of influences upon that rating of acceptability. The relative strength of each variable concept was measured in two ways. First, after rating each story for its journalistic acceptability, the respondent was asked to discuss, in an open-ended format, what factors or considerations led to her acceptability score. (Later, the first three ideas mentioned by each respondent were categorized according to the social determinant they represented.) After reacting to each scenario in her own words, the respondent then reacted to closed-ended items, each intended to represent one of the seven social influences. Respondents were asked to rate the salience of each statement on a scale of one to ten, where one meant that the statement was irrelevant to her thinking about the scenario, and ten meant that the statement was highly important to her thinking. The items were read three times, once after each scenario.[2] Of the two indicators representing the Legal influence, the first was designed to tap the more formal side of this dimension: "I try to recall if there is a law or a recent court decision about (the issue)." The other item was meant to induce thoughts of the legal system, but in a less direct, more pragmatic and of course less formal way: "I wonder if (proceeding with the act) would bring on a lawsuit against myself or my company."

Because two closed-ended items represented each category of influence (independent variable) as a kind of mini-index, their scores were examined to determine inter-item correlation. The correlations were not only significant but robustly so, for nearly every matched pair in every scenario.[3] The coefficients of the measures for each determinant were significantly correlated (at $p < .01$) across all three scenarios as well -- thus enabling a summary analysis that, with few exceptions, does not distinguish between scenarios.

The questionnaire also included a number of items to reflect more "objective" independent variables -- variables that might either help explain the dependent variable or serve as antecedents of the independent variables. For example, two "objective" items representing the Legal influence were a self-rating (on a scale of one to ten) of how much attention the respondent pays to legal news about the news media, and whether or not the respondent has ever been threatened with a lawsuit because of her journalistic work. A high score on the first or a "yes" on the second, it was hypothesized, would suggest a stronger presence of the Legal influence in the respondents' reactions to the three scenarios.

The measurement of the key independent variables occurred through both closed- and open-ended questions, but the correlations between the measures from the two methods, even when measuring the same independent variable, were usually nonsignificant. It is likely that the closed-ended and open-ended measures were tapping different dimensions of the same variable; therefore the findings from both methods will be reported here.[4]

Legal Components of the Three Scenarios

Each of the three scenarios in the survey was constructed to suggest legal principles, but not obviously so. The situations could (and were) just as easily regarded as ethical, rather than legal, dilemmas. One of the basic research questions was whether the legal aspect would in fact dominate the journalist's thinking regardless of how conspicuous it was in the situation. Thus the prominence of the law was varied from story to story.

The Nursing Home. In this scenario, a reporter and photographer go undercover to gain access to a nursing home from which they had been officially denied access earlier. The chief moral principle involved is deception in news gathering, although invasion of privacy presents itself as well. The chief legal issue, however, is trespass: entering private property without the consent of the person in possession of the property. American courts traditionally have placed a premium on the sanctity of private property (Pember, 1993), and in many cases over the past fifteen years journalists have been sued successfully for trespass (see for example *Le Mistral Inc. v. CBS*, 1978). The courts more recently have frowned on the media's intrusions onto private property even when the reporters claimed they had perceived "implied consent" (*Miller v. NBC*, 1986). Laws on trespass and intrusion (a related tort that does not necessarily involve entering private property) vary from state to state, but in Wisconsin, where the survey was conducted, the privacy statute specifically cites trespass and intrusion as actionable torts (Wisconsin Privacy Act). Here the legal issue was meant to achieve mid-level prominence. Aspects of the deception were played up in the scenario, but many respondents in the open-ended responses cited the problem with trespass nonetheless.

The Juvenile's Name. The second scenario concerns whether to publish (or broadcast) the name of a teen-age suspect in a highly-publicized murder in the community. This scenario too represents the ethical issues of invasion of privacy, as well as special regard for children. The concern with invasion of privacy is legal as well as ethical, and of the three scenarios, this one was designed with the highest profile for the Legal influence. The legal issue involves the privacy of juveniles suspected of crimes. In Wisconsin there is no formal legal sanction against publishing a juvenile defendant's name, but the law is complicated on this point. According to the state children's code

(Wisconsin Children's Code, Sec. 48.396), journalists may see court records involving juvenile suspects as long as they do not reveal the child's identity. Another section of the code (Children's Code, Sec. 48.31) permits the media to attend hearings involving juvenile suspects, but again as long as they do not divulge the names of the children involved. However, there is no restraint on the publication of the juvenile's name or any other facts of the case if they were learned outside the judicial system -- from friends, family or teachers, for example. A U.S. Supreme Court decision (*Smith v. Daily Mail*, 1979) established the right of the news media to identify juvenile suspects as long as the information is obtained legally, is truthful, and enjoys public significance. In both Dane and Milwaukee counties, there is a strong informal tradition that discourages the publication of juvenile suspects' names regardless of how the information was obtained. In the open-ended responses, many respondents cited what they thought was a formal prohibition against using the name under any circumstances. As the discussion above suggested, often the perception of the law, even an incorrect perception, can have as great an effect on the legal actor as the formal law can.

The Candidate. The third scenario was designed to elicit ethical considerations of fairness. Here a mayoral candidate is the target of allegations, lodged by disgruntled former employees, of improprieties. A news outlet decides to report the allegations without verifying them or even contacting the candidate for his side of the story.

This story also presented an act that was quite possibly libelous, but of the three scenarios, the legal problem was meant to be the least obvious in this case. In *New York Times v. Sullivan* (1964), the U.S. Supreme Court established a precedent that now protects journalists from libel suits by public figures -- unless the plaintiff can show that the published material was false and was published with "actual malice," that is, with knowledge of the material's falsity or with "reckless disregard for the truth." In subsequent cases the Court refined its definition of malice to include the entertaining of "serious doubts" as to the veracity of the allegations at issue or a "high degree of awareness of their probable falsity" (*Garrison v. Louisiana*, 1964; *St. Amant v. Thompson*, 1968). Actual malice can also be seen in a failure to contact central or key sources to verify information of dubious credibility (see, for example, *Harte-Hanks v. Connaughton*, 1989). As the Court concluded in *Connaughton*, usually some combination of these factors is needed to demonstrate with convincing clarity that actual malice was present in the mind of the journalist. Such factors were presented in the third hypothetical scenario. But how many respondents would recognize the situation as potentially libelous?

Hypotheses

Five hypotheses were tested:

H1: The Legal influence will have relatively weak associations with the journalists' decisions, across all three scenarios. This prediction encapsulates the general law-and-society assumption that the formal law's influence is indirect (as discussed above) and perhaps even mediated through other independent variables.

H2: In the Juvenile's Name scenario, the frequency and predictive strength of the Legal influence will be higher than it is in either of the other scenarios. This hypothesis follows the intention to try to tease out legal responses more in one scenario than the others, to learn whether there is situational variance in the Legal influence.

Analysis was also conducted to discover any factors that predict whether the Legal influence will be salient in a journalist's decision. Three additional hypotheses were constructed:

H3: The more attention the journalist pays to legal news affecting the news media, the greater the influence of the law in her decision-making. It would follow logically that one measure of the salience of the formal law would lead to high salience for the law in a given hypothetical decision.

H4: The more a journalist has been threatened with lawsuits, the more salient will be the Legal influence. It seemed logical that at least in an informal sense, the threat of legal punishment also would make a journalist more aware of legal factors.

H5: The larger the size of the media organization, the less important will be the Legal influence. This hypothesis was derived from Viall (1992), who had hypothesized major differences in Extramedia influences according to size of the media market. As the Legal is essentially a different, more abstract type of Extramedia influence, the logic can be applied here. Small outlets are vulnerable to the high costs of either litigation or out-of-court settlement, and it is likely that even entry-level journalists would be aware of their employer's vulnerability. Kaufman (1989) found that between the mid-1970s and early 1980s the average libel award soared from $480,000 to $2 million. A 1986 survey by the American Society of Newspaper Editors (cited in Eberhard, 1987) found that among its membership the average cost of defense in a libel suit was $96,000. Journalists in larger companies, on the other hand, may feel more empowered by their employers' retention of the best media attorneys in the state, or at least their possession of sufficient libel insurance to withstand a major loss in court.

Findings

The data reveal that Legal influence was among the most powerful in this study's matrix of influences -- but not predominantly so. In Table 2 we can see a robust response to the Legal items in the closed-ended format. With a mean response of 7.73 for the combination of both Legal items, this determinant was outdone by only one other category in the model.

But as usual, the recognition memory displayed in the closed-ended responses did not tell the whole story. The open-ended format put Legal mentions near the bottom of the hierarchy (Table 1), with an average of only one Legal mention from every five respondents. Apparently when reminded of the importance of legal considerations (in the closed-ended format), respondents were quick to agree, and agree strongly. But when left to their own recall memory, those legal considerations did not often come to mind.

As for their predictive power, the multiple regression analysis reflects the same phenomenon the frequencies do. In the closed-ended format, the strong salience of the law predicts significantly to a disapproval of the contemplated action (Table 4). In fact, Legal influence is the strongest in a block of strong variables, and it is the only one to retain its significance throughout the regression at a p-level of less than .05. On the open-ended side, however, Legal influence never approaches significance (Table 3).

The discrepancy between the open-ended and closed-ended strengths of the Legal influence suggests that perhaps the influence of the law is indeed often mediated by the other social influences. For example, the open-ended response "You just don't use the name of a juvenile suspect" was coded as Occupational -- a behavioral norm common to journalists. It could be, however, that the pronouncement was also a reflection of some legal result that preceded the understanding of that norm, such as a lawsuit or contempt-of-court citation against a colleague, and is now incorporated into that journalist's conception of professionalism. The comments coded as Legal included some reflections of the informal law ("I'd use it if I wouldn't get in any legal trouble," "The paper might get sued," e.g.), but more of the open-ended responses were directly related to formal, legal proceedings ("Unless he has been charged as an adult, then you can't use the name," "This is a matter of public record," "This would invade the family's right of privacy," e.g.). It may be that the open-ended code guide was capturing more of the formal aspects of the law, but the law's informal dimension was present nonetheless, as often filtered through the other variables.

Be that as it may, the law -- certainly the formal law, perhaps too its informal aspects -- is a force of some strength. Hypothesis 1 had predicted flimsy results in relation to the other determinants. That proved true for open-ended responses, but not in the closed-ended results.

The results show only a modicum of support for Hypothesis 2. The Legal items received significantly higher scores in the Juvenile's Name scenario, in both closed-ended and open-ended formats (tables 1 and 2). But the frequency does not carry over into influence on the dependent variable. In regressions run for only the Juvenile's Name scenario (for both question formats), the Legal influence was non-significant as a predictor of acceptability. Thus the Legal determinant occupies a visible presence in the Juvenile's Name scenario, but when put to the test of multiple regression, its direct influence fades, most likely becoming mediated through other, more salient determinants.

Hypothesis 3 likewise wins little support. Table 5 shows that while the relationship between attention to legal news and salience of the Legal influence may have been promising as a first-order correlation within the closed-ended format, it is nonsignificant in the more rigorous regression analysis -- in both closed-ended and open-ended formats. The failure to support the hypothesis could be a reflection of the nature of legal news about the media. Controversies do not erupt, and Supreme Court decisions are not handed down, regularly or frequently. They may capture many journalists' attention when they do, but legal news may not have a pervasive or steady enough presence that it influences attitudes during daily decision-making.

There was no support for Hypothesis 4 either. In both response formats, the relationship between being threatened with a lawsuit and the Legal influence was nonsignificant and, if anything, drifted into the negative. It could be that threats of a lawsuit simply reflect a journalist's general, career-long inattention to (or defiance of) legal factors: Those who live close to the legal edge, without regard for Legal factors, tend to be the ones who have been threatened or actually sued. Those who do cite legal factors tend to be legally careful -- so careful that they have rarely been threatened with a lawsuit.

Concluding the hypothesis shutout is the implication in the data (Table 5) that in both the closed- and open-ended analyses, the differences between journalists at large organizations and smaller shops is negligible.

Unhypothesized Results

There did emerge, however, predictors that had not been hypothesized. Chief among them was the frequency of ethics discussions in the newsroom. Its influence is present only for closed-ended responses (Table 4). Apparently, the more frequently a journalist engages in informal ethics discussions, the more positively she responds to the importance of legal factors. Interestingly, however, these discussions do not predict to Legal's salience during the open-ended responses.

So who are the types of journalists who do mention legal factors in the open-ended format? The newsies. Journalists working in "hard news" (serious public-affairs reporting) are more likely to mention legal reasons than are their co-workers in non-news departments (which in this sample included members of sports, weather, features and photography departments). This result should hardly be surprising. It is hard-news work that involves the vast majority of legal situations that journalists are likely to encounter. Sports and weather journalists and photographers mentioned legal factors at roughly half the frequency of hard-news writers.

Almost as strong as the type of work in predicting the mentions of Legal factors was the Feedback variable. The association was negative: The less frequently a journalist hears from outsiders about her work, the more likely she is to mention Legal concerns in the open-ended format. This result may be suggesting simply that wherever it is that journalists get their information and training on legal matters, it is not from news sources, audience members, news subjects or the like.

It could be from professional organizations, as Table 5 further suggests. Alongside the curious negative association between feedback and Legal salience is a positive association, narrowly missing .05 significance, between the level of activity in professional organizations and Legal salience. The "active professional" did not turn up as a significant predictor of many of the determinants, but it could be that active participation in seminars, conferences and meetings raises a journalist's awareness of legal obligations.

Summary and Conclusions

The Shoemaker-Reese "hierarchy" model thus proved a sturdy template for a model of influences on legal decision-making. In the course of the study, however, it became apparent that because legal decisions are different from media content, some alterations and specifications were necessary for the new model. But the original metaphor remains apt. This result is hardly surprising to many legal scholars, as intuition alone implies that a social context drives most legal decisions; this study, however, has provided detailed empirical support for that notion. There does seem to be a hierarchy of influences upon journalists' decision-making in legal situations, in that some factors steer the journalist toward a decision more prominently, or influentially, than others. As with most social-scientific conclusions, of course, much depends upon contingent conditions. We have seen that the results can depend upon how the influence was measured. When the survey measured the recall memory of journalists with open-ended questions, Extramedia and Small Group influences emerged as the most powerful, each leading the journalist to an approval of the legally risky actions they had just heard about. But when their recognition memory was being tapped, through closed-ended items, the Legal influence was the most direct, and it tended to lead them toward disapproval of the actions. Also in the closed-ended format, the influences of Competition, Small Group, and Extramedia emerged too as significant. Thus the two methods of questioning have lent greater depth to the findings, as they reveal different types of influences during different styles of cognitive processing. Also, a determinant's strength can be measured in more than one way. The principal measurement in this study was multiple regression, to determine the predictive strengths of several independent variables simultaneously. But a variable's failure to produce a directional association -- either approval or disapproval of the journalistic act -- does not always mean the variable lacks any kind of strength.

If we were to order the hierarchy on the basis of all the measures involved in the study, Small Group, Organizational, Occupational, Extramedia, and Legal influence would be accorded the most strength as predictors of legal decisions. Competitive influence was clearly not in that class of strength, and Individual influence brings up the rear.

The utter inability to declare one "most powerful" determinant strongly suggests that there is no single source of legal direction. If we were to construct a formal legal model for journalistic decision-making, it would contain these elements: Journalists confronting a situation with legal implications (1) know there are legal implications, (2) use their knowledge of the law as the primary basis of their decision, and (3) act to comply with the law. Using the law-and-society perspective, we have set out to test these assumptions empirically and have found that the Legal influence is not as strong as the model would assume. We have seen from the face-to-face interviews that journalists take a number of "informal" attitudes toward media law by which they can often escape having to know about or think about the formal law. We have seen through the quantitative data that when journalists are later "reminded" of the possible influence of the formal law, through closed-ended items, they accord it high importance. This importance is also strongly and negatively associated with the eventual decision in the dilemma; that is, thoughts of the formal law serve to discourage them from supporting a risky course of action. But when they are first asked to explain, on their own, which factors help them in a dilemma imbedded with substantive legal elements, they tend not to think of legal factors. If the formal model were working at full force, we would have seen the journalists picking through the legal implications of the dilemmas and citing the law as a guiding force in the open-ended format as well. Instead, the law takes its place among other determinants: A strong influence in the closed-ended format, but not a dominant influence; and a weak influence in the open-ended format, though not a negligible one.

To return briefly to Tyler's conception of compliance, it seems that journalists use a combination of normative and instrumentalist reasoning as they work out a legal problem (Tyler's thesis was that normative considerations are more influential). There was evidence of legitimacy (in the strength of Occupational influence) and morality (in the strength of Extramedia influence), which are Tyler's two subsets of normative reasoning, but there was also evidence of instrumentalism, in the strength of Small Group, Organizational, and of course formal Legal influences themselves.

In day-to-day news work, a newsroom problem is hardly ever labeled "Legal Dilemma!" as it raises its troublesome head. Even if the Supreme Court has just handed down a ruling on that very type of dilemma the day before it arises, there is no guarantee that Legal influence will guide the journalist's decision. Legal influence must first enter the consciousness of the decision-maker, and it must then compete with other influences that may be equally strong.

Implications for Media Policymakers

Legal decision-making should matter to journalists, and it should matter to media managers. Journalists' credibility, their fitful progress toward professionalism and perhaps even their legal rights and freedoms depend to a large extent on the manner in which they treat the people they cover. But in pragmatic, policymaking terms, who are the responsible agents for this new level of awareness? The data suggest a few possibilities.

Those interested in raising the legal awareness of journalists who encounter these dilemmas might take a few cues from the analysis of antecedents to Legal influence. It seems that the frequent and *informal* discussion of thorny problems raises one's awareness of the law -- even the law's more formal aspects. For example, those who professed to pay close attention to legal news about the media did not cite legal factors particularly often themselves, or even accord high marks to the law-related items. That could be, again, that legal news about the media tends to be irregular and infrequent. However, those who reported frequent newsroom discussions about ethical questions also gave high scores to legal factors in working out these legal decisions. Reading the legal news doesn't seem to create as much legal impact in the mind of the journalist, apparently, as talking about the situation in general does.

The type of news work also makes a difference in terms of whether legal factors are cited in the open-ended responses. "Hard news" workers, those who tend to encounter legal situations in their day-to-day work more often than sports, features and weather reporters, think more often of the legal factors in a sticky situation. For the classic legal-realist urging remedies to close the "gap" between the formal model and the "living law," a policy solution might lie at the organizational level: Encourage broad-ranging informal newsroom discussions about the issues that come up, with abundant participation from hard-news editors and reporters. And for good measure, encourage participation in professional activities.

To the social scientist, legal studies may seem forever in the domain of the normative, prescriptive scholars who are more concerned with what ought to be than with the pursuit of what seems to be. But the law's impact ought to be observed, and observed as a part of the larger network of attitudes and behaviors of journalists that have always attracted media sociologists' attention. This attempt at the integration of the research literature of media law and legal sociology is offered as an initial step toward a more systematic observation and explanation of journalism law. There will probably never be a seamless merging of these disparate disciplines, but to the extent that each research tradition edges closer to the other, each is strengthened. Jurists who increase their understanding of judicial compliance and impact can at least bring more realistic expectations to their lawmaking. And social scientists who can assess communication's processes and effects in the context of a system of legal values and principles can add a new dimension of social meaning to their empirical findings. The impossibility of marriage of these two paradigms should not preclude the opportunity for dialogue.

Notes

1. Originally 120 journalists for the sample were selected, by use of a table of random numbers. A total of 118 were interviewed, and after some substitutions the overall response rate was 93.3 percent. The sampling frame included not only veteran "hard news" reporters and editors but also entry-level journalists and those specializing in business, sports, lifestyles and features -- even a handful of television meteorologists. Of the 118 journalists in the final sample, 29 (24.6 percent) were classified as either middle- or top-level newsroom managers.

2. Data analysis involved bivariate and multivariate methods, principally multiple regression, to examine the relationships between the social determinants and the dependent variable, or between "objective" variables and the social determinants. For the open-ended responses, the author developed a detailed coding guide that would enable each response to be categorized as a reflection of one of the seven independent variable concepts also being examined in the closed-ended format. Coders coded the first three"mentions" of each respondent on each question. Two coders were used, with a reliability score (using Scott's pi) of .724.

Throughout the study three level of statistical significance are noted, rather than the customary two levels. Significance at probability level of less than .01, less than .05 and less than .10 are noted. The third, unusual, level is reported in order to enable a discussion of results whose significance narrowly misses the standard .05 level. When regressions are computed with a small sample size and a large number of independent variables, statistical significance at less than .05 is more difficult to achieve than with a larger sample and fewer variables. Thus the results at the "looser" level of significance will be noted, but they will be discussed separately from results at levels of less than .05, and they will not be accorded the same confidence.

3. Originally the Organizational influence had two items: one teasing out company policy, the other focusing on the influence of competition. The correlation of those two items was so weak, however, that they were separated and two distinct variable concepts were named: the Organizational influence and the Competitive influence. Each, of course, had only one item representing it in the closed-ended analysis.

4. The measurement of the key variables occurred through both closed- and open-ended questions, but the correlations between the measures from the two methods, even when measuring the same independent variable, were usually nonsignificant. It is likely that the closed-

ended and open-ended measures were tapping different dimensions of the same variable; therefore the findings from both methods will be reported here.

Even though the correlations between open- and closed-ended values for each independent variable were not significant, both the closed-ended and open-ended measures predicted significantly the dependent variable in multiple regression. Their predictive significance held even when the closed- and open-ended measures were entered in the same regression equation. Thus it is likely that the closed-ended and open-ended measures were tapping different dimensions of each variable.

There is very likely a difference in the cognitive processing and response strategies in the two different methods. Social psychologists, working primarily in the domain of personality or candidate evaluation, have at times discovered cases in which people's open-ended thoughts are uncorrelated with responses to closed-ended questions about the same subject (Zaller, 1992). Recent studies have distinguished two processes of evaluative judgment: memory-based and "on-line" (Hastie & Park, 1986). Memory-based judgment relies on the retrieval of facts, reasoning and attitudes from long-term memory; "on-line" processing involves the frequent and immediate updating and adjustment of evaluations as new pieces of information are acquired. Thus an on-line evaluation is not the same independent judgment that a memory-based judgment is, because it has been colored by recent cues as to the evaluation. Lodge, McGraw and Stroh (1989) concluded that the human mind does not rely exclusively on either mode of decision-making.

The closed-ended response is just that -- a response to suggestion. It relies on recognition memory and would seem to use the mode of "on-line" processing, as respondents are given cues that immediately update their evaluation of the forces at work. The open-ended response, on the other hand, sought near the beginning of the interview schedule, is spontaneous and unprompted. It relies on recall memory. It may capture the most "honest" thoughts off the top of the respondent's head, often in the form of schematics or heuristic solutions that are applied to everyday problems.

Thus it seems unwise to jettison either method of measurement. Just as Lodge, McGraw and Stroh made room for both cognitive processes in their conceptual model of political evaluations, we can utilize both methods of question formats to shed light on the present research questions.

Figure 1

Social Influences on Legal Decision-making

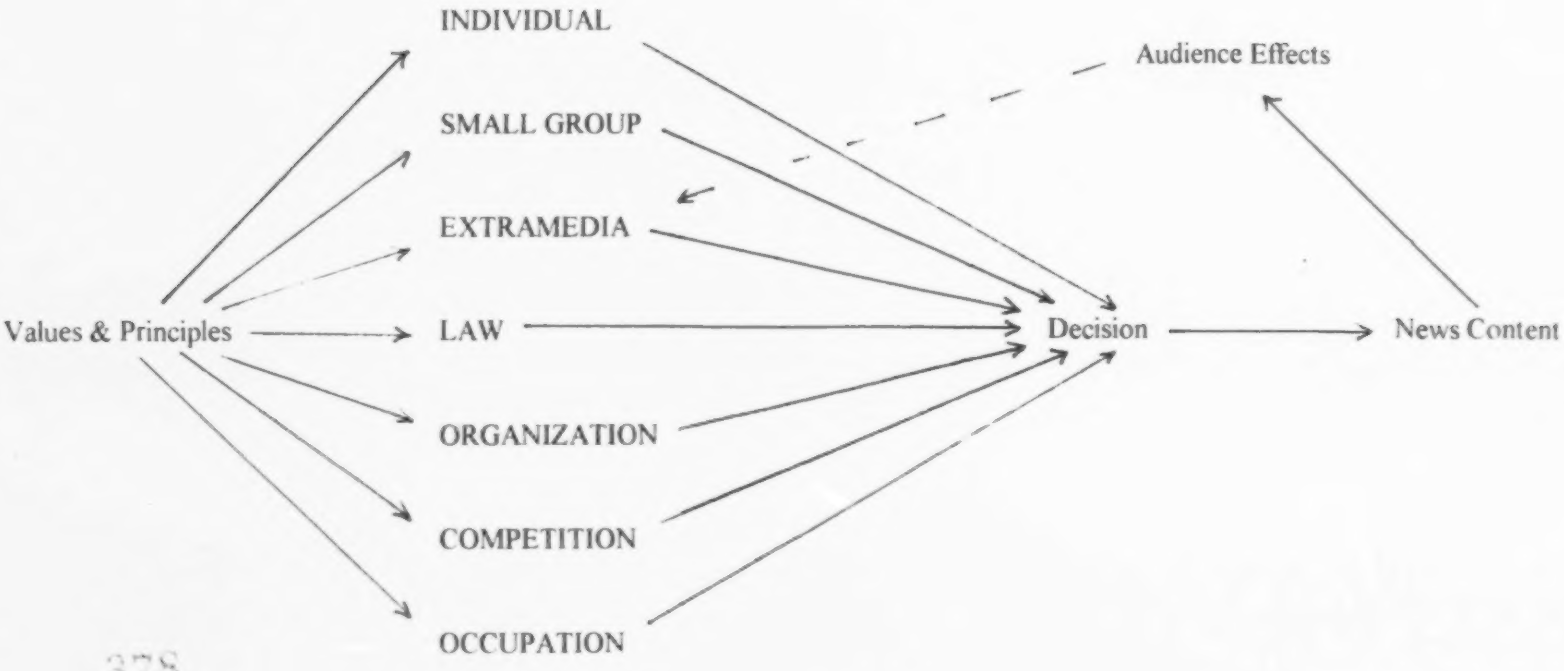
INDIVIDUAL
Audience Effects
SMALL GROUP
EXTRAMEDIA
Values & Principles
LAW
Decision
News Content
ORGANIZATION
COMPETITION
OCCUPATION

Table 1

Means of the Open-Ended Measures of Social Determinants

	Nursing Home		Juvenile's Name		Candidate		**Overall**	
Individual	.32	(.52)	.36	(.59)	.13**	(.34)	**.81****	(.87)
Small Group	.03**	(.18)	.00**	(.00)	.02**	(.13)	**.05****	(.15)
Organizational	.44	(.61)	.59**	(.52)	.11**	(.76)	**1.10**	(.97)
Occupational	.95**	(.75)	.25	(.47)	1.47**	(.76)	**2.66****	(1.23)
Extramedia	.36	(.55)	.30	(.60)	.23*	(.25)	**.89**	(.97)
Legal	.11**	(.34)	.38	(.62)	.11**	(.48)	**.60****	(.70)
Column mean	**.37**		**.31**		**.34**		**1.02**	

n = 118

Notes:

1) Values expressed are the means (and standard deviations) of the number of mentions coded into each variable category for each scenario.

2) Asterisks denote significant difference, either higher or lower, from the mean of mentions for that particular column, as determined by a two-tailed t-test (* p<.05, ** p<.01).

Table 2

Means of the Closed-ended Measures of Social Determinants

	Nursing Home	Juvenile's Name	Candidate	Overall
Individual	**6.97 (2.43)**	**6.63* (2.59)**	**6.96 (2.38)**	**6.87 (2.17)**
Personal Values	7.01 (2.87)	6.69 (2.80)	6.91 (2.68)	6.88 (2.44)
Own Logic	6.92 (2.68)	6.56* (2.69)	6.95 (2.49)	6.82 (2.31)
Small Group	**7.00 (2.24)**	**7.38 (2.10)**	**7.47** (1.95)**	**7.27 (1.81)**
Observe others	6.01** (2.75)	6.47* (2.77)	6.47 (2.59)	6.31* (2.35)
Talk to others	7.99** (2.70)	8.31** (2.40)	8.47** (1.93)	8.26** (2.04)
Organizational	**8.10** (2.77)**	**9.15** (1.68)**	**7.63** (2.56)**	**8.32** (1.92)**
Competition	**6.11** (2.67)**	**5.53** (2.65)**	**6.17** (2.71)**	**5.97** (2.35)**
Occupational	**7.27 (2.11)**	**7.46 (2.07)**	**7.41** (1.80)**	**7.37* (1.69)**
'Professionalism'	7.86** (2.59)	7.73* (2.26)	8.07** (1.95)	7.90** (1.88)
Code of Ethics	6.64 (2.61)	7.19 (2.68)	6.77 (2.38)	6.87 (2.14)
Extramedia	**5.09** (2.47)**	**5.90** (2.40)**	**5.58** (2.27)**	**5.53** (1.95)**
Audience	5.44** (2.87)	5.43** (2.71)	5.98** (2.67)	5.61** (2.32)
Subjects	4.70** (3.21)	6.34* (2.76)	5.17** (2.62)	5.42** (2.21)
Legal	**7.83** (2.69)**	**8.16** (1.67)**	**7.21 (2.23)**	**7.73** (1.72)**
The Law	8.28** (2.44)	9.26** (1.35)	7.68** (2.53)	8.40** (1.65)
Threat of suit	7.38 (2.69)	7.07 (2.76)	6.73 (2.93)	7.07 (2.42)
Column mean	**6.91**	**7.17**	**6.92**	**7.01**

n = 118
Notes:

1) Values expressed are the means (and standard deviations) of the responses (on a scale from 1 to 10) to closed-ended items.

2) The indented phrases represent the individual items that comprise the boldfaced, composite variables immediately above them..

3) Asterisks denote significant difference, either higher or lower, from the mean of the responses for that column, as determined by a two-tailed t-test (* p<.05, ** p<.01).

Table 3

Predicting Acceptability of Journalists' Actions in Legal Situations

Multiple Regression

OPEN-ENDED RESPONSES

	Simple r	Step 1	Step 2	Step 3	Incr. R^2
Demographics					.04
Gender (male)	.00	.04	.04	.07	
Age	-.16	-.15	-.04	-.04	
Education	.12	.13	.13	.09	
Other Key Characteristics					.03
Ever threatened with a Lawsuit	.11		.19	.19*	
Yrs. in Journalism	-.13		-.16	-.19	
Social Determinants					.13*
Individual	.06			.02	
Small Group	.16			.24*	
Occupational	.08			.09	
Organizational	-.18*			-.13	
Extramedia	.23*			.24*	
Legal	-.08			-.05	
Equation F-ratio					2.39 (.01)

n = 118, ^p<.10, *p<.05, **p<.01

Notes:

1) Dependent variable is the acceptability of journalists' actions, summed across all three scenarios.

2) "Other Key Characteristics" are objective variables whose strong bivariate associations had suggested possible predictive power in a regression equation.

3) "Equation F-ratio" refers to the ANOVA test as to whether the blocks of variables entered in the equation explained a significant amount of the variance in the dependent variable.

Table 4

Predicting Acceptability of Journalists' Actions in Legal Situations

Multiple Regression

CLOSED-ENDED RESPONSES

	Simple r	Step 1	Step 2	Step 3	Incr. R^2
Demographics					.04
Gender (male)	.00	.04	.04	-.02	
Age	-.16	-.15	-.04	-.11	
Education	.12	.13	.13	.04	
Other Key Characteristics					.03
Ever Threatened with a Lawsuit	.11		.19	.11	
Yrs./Journalism	-.13		-.16	-.12	
Social Determinants					.15**
Individual	-.04			.00	
Small Group	-.07			.21^	
Competition	.05			.20^	
Organizational	-.21*			-.06	
Occupational	-.23*			-.18	
Extramedia	-.21*			-.22^	
Legal	-.26**			-.26*	
Equation F-ratio					2.40 (.009)

n = 118, ^p<.10, *p<.05, **p<.01

Notes:

1) Dependent variable is the acceptability of journalists' actions, summed across all three scenarios.

2) "Other Key Characteristics" are objective variables whose strong bivariate associations had suggested possible predictive power in a regression equation.

3) In Step 3, the coefficients of Small Group, Competition and Extramedia achieved alpha levels of significance, respectively, of .065, .062, and .053.

4) "Equation F-ratio" refers to the ANOVA test as to whether the blocks of variables entered in the equation explained a significant amount of the variance in the dependent variable.

Table 5

Predictors of Salience of Social Determinants in Legal Situations

(Multiple regression coefficients)

	Individual		**Small Group**		**Organiz'n'l**		**Competitive**	**Occupational**		**Extramedia**		**Legal**	
	Open-ended R^2=.17	Closed-ended R^2=.11	Open-ended R^2=.15	Closed-ended R^2=.12	Open-ended R^2=.13	Closed-ended R^2=.14	Closed-ended R^2=.07	Open-ended R^2=.10	Closed-ended R^2=.20	Open-ended R^2=.08	Closed-ended R^2=.16	**Open-ended R^2=.17**	**Closed-ended R^2=.15**
Gender (male)	.06	.06	-.05	.08	.03	.06	-.01	.14	-.07	-.06	-.01	**-.08**	**-.08**
Age	.21	-.07	.03	-.03	.05	.06	.09	.07	.13	-.27^	.02	**.29**	**.02**
Education	.01	-.07	.06	.10	-.10	.07	-.05	.02	-.25*	.08	-.12	**-.03**	**-.08**
Personal Characteristics													
Type of News Work (lower →'hard' news)	.08	.02	-.06	.09	-.02	.03	-.09	-.07	.08	.05	.02	**-.32****	**.07**
Active in Prof'l Orgs.	-.11	-.01	-.11	-.03	-.15	.12	.01	.06	.00	-.04	-.07	**.18^**	**-.16**
Years at the Company	-.11	.00	.13	-.01	-.09	-.10	-.11	-.16	-.12	.28^	-.10	**.09**	**-.08**
Has Had Other Career	-.21^	-.06	-.11	-.15	.04	-.21*	-.02	-.02	-.04	.10	.05	**.07**	**-.10**
Degree in Journalism	.06	.07	.13*	.06	-.02	.13	.06	.07	.11	-.08	.03	**.04**	**.08**
Position in Organization (lower → management)	.30**	.21^	.04	-.00	-.04	-.04	-.00	-.01	.10	-.01	-.04	**.08**	**.04**
Attention to Legal News	.08	-.07	-.00	.05	-.09	.08	.12	.10	.02	-.10	.22*	**-.10**	**.08**
Ever Threat'n'd w/ suit	-.08	.21*	.04	.03	.02	-.04	.08	.01	-.14	-.01	.07	**-.11**	**-.09**
Organizational Characteristics													
Freq./Ethics Discussions	-.09	.12	.14	.16	.03	.21^	.13	.07	.33**	.04	.16	**.02**	**.18^**
Feedback from Outside	-.11	-.01	-.17^	.13	.01	.14	.09	-.02	.09	.05	-.04	**-.27****	**.08**
Ethics Code at Company	-.25*	-.13	.11	-.09	.27*	.05	-.03	.03	-.05	-.04	-.02	**.04**	**.06**
Media Type (lower → print daily)	.01	-.02	-.06	-.02	.21^	.04	-.07	.11	.00	-.03	.04	**-.09**	**.05**
Size of organization	.03	-.12	.10	-.13	-.04	-.15	-.10	-.02	-.15	.01	-.13	**.02**	**-.05**

n = 118, ^p<.10, *p<.05, **p<.01

References

Abel, R. (1973) Law Books and Books About Law. *Stanford Law Review*, 26, 175-189.

Antunes, G., & Hunt, A. L. (1973). The Deterrent Impact of Criminal Sanction: Some Implications for Criminal Justice Policy. *Journal of Urban Law*, 51, 145-179.

Arant, M. D. Jr. (1991). Press Identification of Victims of Sexual Assault: Weighing Privacy and Constitutional Concerns. *Journalism Quarterly*, 68, 238-252.

Berkowitz, L., & Walker, N. (1967). Laws and Moral Judgments. *Sociometry*, 30, 410-425.

Bezanson, R. P., Cranberg, G., & Soloski, J. (1987). *Libel Law and the Press.* New York: The Free Press.

Breed, W. (1955). Social Control in the Newsroom. *Social Forces*, 33, 326-335.

Chambliss, W. J. (1967). Types of Deviance and the Effectiveness of Legal Sanctions. *Wisconsin Law Review*, 1967, 703-741.

Eberhard, W. B. (1987). There's Got to Be a Better Way: Alternatives to the High Cost of Libel. *Mercer Law Review*, 38, 819-834.

Felstiner, W. L. F., Abel, R., & Sarat, A. (1981). The Emergence and Tranformation of Disputes: Naming, Blaming, Claiming . . . *Law & Society Review*, 15, 531-554.

Friedman, L. M., & Macaulay, S. (1977). *Law and the Behavioral Sciences* (2nd ed). Indianapolis: The Bobbs-Merrill Co.

Galanter, M. (1974). The Future of Law and Social Science Research. *North Carolina Law Review*, 52, 1060-1089.

Gillmor, D. M., & Dennis, E. E. (1975). Legal Research and Judicial Communication. In S. H. Chaffee (Ed.), *Political Communication: Issues and Strategies for Research.* Beverly Hills: Sage.

Hastie, R., & Park, B. (1986). The Relationship Between Memory and Judgment Depends on Whether the Judgment Task is Memory-based or On-Line. *Psychological Review*, 93, 258-268.

Hockwar, M. E. (Comment) (1990). Bad News: Privacy Ruling to Increase Press Litigation. *Akron Law Review*, 23, 561-573.

BEST COPY AVAILABLE

Kaufman, H. R. (1989). Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation. In E. E. Dennis & E. M. Noam (Eds.), *The Cost of Libel: Economic and Policy Implications*. New York: Columbia University Press.

Kirtley, J. E. (1991). A Reflection on the News Media, Personal Privacy and the First Amendment. *Valparaiso University Law Review*, 26, 89-99.

Kramer, I. R. (1989). The Full-Court Press: Sacrificing Vital Privacy Interests on the Altar of First Amendment Rhetoric. *Cardozo Arts & Entertainment Law Journal*, 8, 113-136.

Lodge, M., McGraw, K., & Stroh, P. (1989). An Impression-based Model of Candidate Formation. *American Political Science Reivew*, 83, 399-420.

Macaulay, S. (1984). Law and the Behavioral Sciences: Is There Any There There? *Law & Policy*, 6 (2), 149-187.

Pember, D. R. (1993). *Mass Media Law* (6th ed.) Dubuque: WCB Brown & Benchmark.

Pritchard, D. (1986). A New Paradigm for Legal Research in Mass Communication. *Communications and the Law*, 8 (4), 51-67.

Schwartz, R. D., & Orleans, S. (1967). On Legal Sanctions. *University of Chicago Law Review*, 34, 274-301.

Shoemaker, P. J., & Reese, S. D. (1991). *Mediating the Message: Theories of Influences on Mass Media Content.* New York: Longman Publishing Group.

Skolnick, J. H. (1968). Coercion to Virtue: The Enforcement of Morals. *Southern California Law Review*, 41, 588-626.

Stevens, G. E. (1991). Names, Newsworthiness and the Right to Privacy. *Communications and the Law*, 13(2), 61-74.

Stone, C. (1975). *Where the Law Ends: The Social Control of Corporate Behavior*. New York: Harper.

Tyler, T. R. (1990). *Why People Obey the Law*. New Haven: Yale University Press.

Viall, E. K. (1992). Measuring Journalistic Values: A Cosmopolitan Community Continuum. *Journal of Mass Media Ethics*, 7(1), 41-53.

Zaller, J. (1992). *The Nature and Origins of Mass Opinion*. New York: Cambridge University Press.

Cases and Statutes Cited

Florida Star v. B.J.F., 491 U. S. 524 (1989).

Garrison v. Louisiana, 379 U. S. 64 (1964).

Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989).

Le Mistral v. CBS, 402 N.Y.S.2d 815 (1978).

Miller v. NBC, 232 Cal Rept. 668 (1986).

Smith v. Daily Mail Publishing Co., 443 U. S. 97 (1979).

New York Times v. Sullivan, 376 U.S. 254 (1964)

Wisconsin Children's Code, Sec. 48.396, Records.

When Copyright Law Silences Creativity: Digital Sampling and a Group Called "Negativland"

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Abstract

When Copyright Law Silences Creativity: Digital Sampling and a Group Called "Negativland"

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Alternative musicians, like the San Francisco based group Negativland, are using the technique of digital sampling to produce their art. In digital sampling the artist takes short pieces of recorded sound and remixes, loops, and alters that sound into an aural collage.

Copyright law requires that the digital sampler receive permission to use any recognizable segment of sampled sound, but many "found-sound" artists and rappers (who also use digital sampling) are not complying with the law.

This essay reviews the copyright requirements that apply to digital samplers paying special attention to the Fair Use defense for copyright infringement. Sampling is only fair use if the sample taken is too short to comprise the "heart" of the original composition or if it constitutes a parody. Even in the case of parody, the sampler may still face a lawsuit requiring him/her to prove in court that the work is, in fact, parodic. For the small-time sampler, it may be more cost effective to pay a copyright royalty than to fight for their rights in court. The 1991 lawsuit brought against Negativland illustrates this point and is examined in detail.

The review of copyright law and examination of the lawsuit against Negativland both point to the need for compulsory licensing for digital samples. Without such licensing the emerging art form of the digital sampler may be stifled.

When Copyright Law Silences Creativity: Digital Sampling and a Group Called "Negativland"

> Sampling is the incorporation of previously recorded works into new musical compositions. Digital sampling devices enable an artist to electronically capture and manipulate previous sound recordings. The sampled sound may be as small as a single note or beat, or may be a longer phrase or musical passage. Often a short (several seconds) musical sample is electronically repeated, or "looped," to create the framework for a new song. Today, sampled sounds appear on an ever growing number of hit recordings. Using equipment that is readily available and rapidly becoming less expensive, those who sample have the history of recorded sounds at their fingertips. Recorded material, ranging from gunfire culled from a Hollywood western, to a quip from television's talking horse, Mr. Ed, to a familiar guitar "riff" from an old rock and roll record, has been appropriated by samplers and integrated into new works. (Brown 1992, p. 1942-1944)

The evolution of technology certainly progresses at a faster pace than the law. It took over 70 years for the law to recognize that music fixed in the form of sound recordings was entitled to copyright protection (Korn 1992). Advances in digital recording technology are making sampling easier and more accessible to the average musician. This new art form is currently proliferating in the work of rap musicians and other more experimental and avant garde artists. The law, however, has not been prepared for this explosion in the use of sampling.

Negativland, a Bay-area alternative music group, claims to have been driven out of the recording business by an overzealous use of copyright law. Negativland produced a sampled parody of rock group U2's hit single "I Still Haven't Found What I'm Looking For" in 1991. By 1992 Negativland claimed to be "...without any income from our past work, and unable to release anything new, independently or with another label. We are stuck in limbo and close to broke in our personal lives."[1] Their troubles stemmed from a lawsuit resulting from their unauthorized use of U2's music. Copyright law was never intended to stifle creativity and free speech. If the use of copyright law results in suppression of speech, then either the law or its application is in need of revision.

The purpose of this essay is to examine digital sampling and copyright law to determine whether changes need to be made. In particular, the lawsuit against Negativland will be examined in detail to determine how matters got so out of control and whether Negativland is really the victim it claims to be. The essay will begin with a review of the evolution of sampling technology.

Digital Sampling

Sampling probably got its start in the early 1940s with "musique concrete." This was a musical style developed by French electrical engineers and radio broadcasters that combined all kinds of incidental musical, nonmusical, and unmusical sounds and noises into an aural collage. In the early 1960s a device called a Mellotron was used to loop tapes of prerecorded sounds to create new compositions. The Mellotron was the precursor to the modern string synthesizer (Johnson 1993). Today, the Musical Instrument Digital Interface, or MIDI, is used to store sound in a computer where it can be modified and/or arranged in seemingly infinite combinations (Sanjek 1992).

While sampling is most often associated with the genre of rap and hip-hop, it is actually used in a wide variety of musical forms. Sanjek (1992) distinguishes four general areas where sampling is currently being used. "First, there are those records which sample known material of sufficient familiarity so that the listener may recognize the quotation and may, in turn, pay more attention to the new material as a consequence of that familiarity...Secondly, there are those records which sample from both familiar and arcane sources, thereby attracting a level of interest equal to the lyrical content... [Thirdly] in a process dubbed 'quilt-pop' by critic Chuck Eddy, recordings can be constructed wholecloth from samples to create a new aesthetic... Finally, sampling has been utilized in the ever proliferating domain of 'mixes.' As new dance forms or performance styles come into fashion, mixers... are hired to produce alternate versions of a given recording in that style" (p. 612-615). Negativland produces recordings characterized by the third area discussed above. "They act as what Simon Reynolds has called 'chaos theoreticians,' for their work reflects the chaos of society by metronomically replicating the din and collisions of a traumatized civilization" (p. 613).

The technique of digital sampling has created a legal quagmire involving two competing interests. First, there is the interest of the sampler to create using "found sound." Samplers such as Negativland, where the majority of their work consists of recombinations of audio samples, feel that it is unfair and impractical to expect them to obtain permission for each sample used. Such artists use the media environment that surrounds them as the raw material for their art. They are concerned that the imposition of legal controls, such as copyright, are, in effect, quelling their voices and preventing their art. Negativland has this to say:

> It is time to drastically revise the outmoded copyright laws, particularly with regard to the content of electronic media...The revision of copyright protection is now necessary because media artists of every variety have long since left Congressional intentions of cultural ownership in the rear view mirror... But in doing so, today's artists are driving their sporty little art illegally. They can be pulled over and sent to debtor's prison, because their only license is an artistic one. Yet these vehicles of appropriation present no menace of any

> kind to the general population. The only supposed threat is to the unsatisfiable greed of an extreme minority of private cultural owners. The reason for today's repressive cultural traffic laws is based purely on economic control, and, as such, serves to keep many artists off roads they need to be exploring. The significant urge to incorporate found sound into contemporary music for instance, is now in virtual gridlock on the way to a drawbridge that's always up. We should be giving our artists a wide open freeway through an environment full of media influences, but this route is being aggressively denied by art cops working for the self-serving marketing system that has imposed itself on culture."[2]

In the eyes of the "self-serving marketing system," the problem is simply one of being compensated for work performed. The *United States Constitution* gives Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" *(art. I, sct. 8, cl. 8).* The theory behind copyright law is that, if an artist is given an incentive to create, then they will do so and the public as a whole will benefit. Fame, control over how their work is used, and money are considered reasonable incentives (Colchamiro 1992). When a samplers use bits and pieces of other artists' work, particularly when they intend to sell the end product commercially, they are profiting from another person's labor. Negativland vehemently disagrees with this point of view. "...it is only greed and opportunism which assumes that other's partial or fragmented use of that work, being no part of the original artist's efforts, should additionally profit that artist. It is simply unearned gravy existing only because of another's efforts to begin with."[3] Nevertheless, the *1971 Sound Recording Act, the 1976 Copyright Act*, state privacy law, and the *1946 Lanham Act* all hold that the original creator of a work is entitled to some degree of control over how his/her work is used and just compensation for any approved use.

The Sound Recording Act

Until the passage of the *Sound Recording Act of 1971*, sound recordings were not protected by copyright law. Under the *1971 Act*, sound recordings fixed after February 15, 1972 are entitled to federal copyright protection. Sound recordings fixed prior to that date, while unprotected by federal copyright law, may be protected by state laws dealing with unfair competition, privacy and antipiracy (Allen 1992). *The Sound Recording Act* does allow imitations of an original work, even those where the performer is trying to simulate another's performance as closely as possible.

> The exclusive rights of the owner of copyright in a sound recording ... is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a cound reocrding... is limited to the right to prepare a derivitabe work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording... do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. *(17 U.S.C. Section 114)*

The compulsory license provision under copyright law provides for such uses. What is not allowed is to re-record sounds from the original work without securing permission

State Privacy Law

For sound recordings copyrighted before the passage of the *1971 Sound Recording Act*, samplers may run afoul of state privacy laws. Since the original artists possess a property right in their creations, then any unauthorized use of that creation may violate that person's right of publicity. In most states, the right of publicity is an individual's right to control the commercial exploitation of his/her name, face, talents, and accomplishments *(Zacchini vs Scripps-Howard 1977)*. In the case of the sampler, misappropriation may occur if the sampler uses the name of the sampled artist in packaging or advertising in such a way as to enhance purchaser interest in the recording (Allen 1992).

The Lanham Act

The Federal Lanham Act, while often assumed to deal only with trademark infringement, also protects the consumer and business competitors from a wide variety of unfair trade practices *(15 USC 1127)*. *The Lanham Act* could be used against a sampler if the sampler caused the public to think, falsely, that the original artist had consciously contributed to the sampler's efforts. It would also be a problem if an artist's work were used and not attributed to that artist. In this case the sampler would be "passing off" that work as his/her own, and this would also result in unfair competition.

Copyright Law

Section 106 of the *Copyright Act of 1976* specifies five exclusive rights that the owner of a copyright possesses: 1) the right to reproduce the copyrighted work in copies or phonorecords; 2) the right to prepare derivative works based on the original; 3) the right to distribute copies of the work to the public by sale or other transfer of ownership; 4) the right to perform the work publicly; and 5) the right to display the work publicly. There are two separate copyrights that pertain to recorded materials: the copyright in the musical composition and the copyright in the sound recording. The composer of a musical work owns the copyright in the music and any accompanying lyrics. The record company (including musicians, vocalists, engineers, etc.) owns the copyright in the actual recorded performance. (Johnson 1993).

Section 115 of the *Copyright Act of 1976* establishes a compulsory license for making and distributing recordings of previously published musical compositions. This license allows a recording artist to record a "cover" version of a previously recorded and released musical composition providing they do not alter the "basic melody or fundamental character of the work" and that they file a notice of intent and pay the required royalties. Korn (1992) reports that the royalty rate in 1992 was set at 5.7 cents (or 1.1 cent per minute, whichever is larger) per song for each copy manufactured and sold. (p. 338). This compulsory license does not apply to the incorporation of any part of the existing sound recording into a new work, nor does it allow for the creation of any kind of derivative work based on the original composition. To do either of the latter, the artist must obtain separate license from the holder of the copyright (Allen 1992). At present, there is no uniform royalty rate for these uses and each license is obtained by bargaining with record companies, artists, and publishers on a case-by-case basis. There is also the possibility that the copyright holder will simply refuse permission (Brown 1992).

Fair Use

If a "sampler" chooses to incorporate copyrighted materials into his or her work without negotiating a license to use those materials, there is a risk of a copyright infringement suit. The most common defense attempted in these cases is that of fair use. *Section 107* of the *Copyright Act of 1976* establishes the principle of fair use. This principle acknowledges that there may be situations where copyrighted materials may be used without obtaining permission or paying royalties, such situations as criticism, comment, news reporting, teaching, scholarship, or research. Fair use is not limited to the above listed situations. Instead, it is determined on a case-by-case basis. *Section 107* sets out the factors that are to be considered in such a case: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the use; and 4) the effect of the use on the potential market for or value of the copyrighted work.

In the first factor, the purpose and character of the use, the court tries to determine whether the use was for commercial or nonprofit purposes. If the use is determined to have a commercial nature, then this factor will weigh against a finding of fair use. Johnson (1993) suggests that it is inappropriate to judge digital sampling in this manner for the following reasons: first, sampling technology is so new that no set customary price exists for the use of the sample; and second, a musician almost always writes a song for a commercial purpose. If the fact that the sampler is trying to make a profit from his/her work means that the sampler may never make use of any sampled material without obtaining permission, then many "found-sound" artists are likely to be run out of business. However, the owner of the copyright is entitled to be compensated for his/her work. A form of compulsory licensing would resolve this issue in a manner that would be fair to both the samplers and the copyright holders.

The second factor, the nature of the copyrighted work, examines whether the copyrighted work is published or unpublished, composed of straight-forward facts (as in a biography or phone book) or is a creative work. The court is more likely to find in favor of fair use if the sampling is from a factual source rather than a creative source. Recordings of common sounds, such as a jet taking off or a phone ringing, are less likely to be protected than unique musical compositions or vocal stylings. Sampling from previously unpublished recordings (bootlegged tapes, studio outtakes, etc.) is very unlikely to yield a finding of fair use. In *Harper & Row Publishers, Inc. v. Nation Enterprises (1985)* the Supreme Court made it quite clear that use of unpublished excerpts from President Ford's autobiography was improper. del Peral (1989) indicates that the fair use doctrine does not sanction the use of unpublished work, because it infringes on the creator's right of first publication. And the right of first publication is a primary basis for copyright.

In the third factor, the amount and substantiality of the use, the question is not so much exactly how many seconds of the original recording were used but whether the "heart" of the work was used. The "heart" of the work may be defined as its chorus or hook, that part of the work which makes it most recognizable and valuable. In *Grand Upright Music Limited v. Warner Brothers Records, Inc. (1991)* composer/performer Gilbert O'Sullivan sued the rap group Biz Markie for using a portion of his recording (which he also composed) "Alone Again, Naturally" in their recording "Alone Again." Critical to the finding against Biz Markie was the fact that they had attempted to obtain permission from Gilbert O'Sullivan to use his recording, but released their album to the public before permission had arrived. Permission was subsequently denied[4]. Although, the court in this case did not evaluate the fair use defense, Brown (1992) asserts that, had such a defense been made, it would have failed, because the portion sampled from the original recording was the "hook" in the original composition and that, with the exception of a repetitive drum pattern and Markie's vocals, there was no other music on the track. The courts will sometimes find a *de minimis* use defense persuasive when only a very small portion of the original work is used, but in the *Grand Upright Music* case, the sampled segment was far too long to justify this finding.

The final factor in determining fair use, the effect on the potential market value of the work, is considered the most critical. According to the Supreme Court, it is not necessary to show that there is any actual present harm nor any certainty of future harm. All that is necessary is to show that there is "*some* meaningful likelihood of future harm" (Johnson 1993, p.154). Johnson (1993) indicates that if any of the five exclusive rights of the copyright owner of the original composition or of the sound recording are adversely affected either actually or potentially, fair use cannot be presumed. He goes on to say that the courts have interpreted this factor to include a consideration of whether the challenged use or practice, if widespread, would have a detrimental effect on the industry as a whole. "Indeed, massive amounts of sampling without payment of compensation to the copyright owners would have such an affect upon the music industry. Theoretically then, this factor will almost always weigh against a finding of fair use in a sampling infringement case" (p. 155).

Parody and Fair Use

Parody presents a special circumstance when a sampler may be allowed to use substantial portions of copyrighted material for commercial purposes and still be able to claim fair use.

Prior to 1994, the courts offered contradictory advice to parodists. In *Elsmere Music Inc. v. National Broadcasting Co. (1980)* the district court found that a parody is entitled to make extensive use of an original work provided it builds upon the original and contributes something new for humorous effect or commentary. This was later confirmed by the federal appeals court. In *Fisher v. Dees (1986)* the federal appeals court decided that a song is difficult to parody effectively without using an exact or near exact copy. In 1992 the federal appeals court followed a different logic and decided that, because the parody was created for a commercial profit, 2 Live Crew's version of Roy Orbison's "Pretty Woman" was not a fair use.[5] This, however, was not the last word on parody. The Supreme Court later reversed and remanded this decision. Because this case has provided the definitive ruling on parody and fair use, it is useful to look at the Supreme Court decision in detail.

In 1964 Roy Orbison and William Dees wrote "Pretty Woman." The copyright was assigned to Acuff-Rose Music, Inc. On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose Music that 2 Live Crew had written a parody of "Pretty Woman" and that they were willing to pay a fee for their use of the song. A transcript and recording of the parody were included in the correspondance. Acuff-Rose refused permission. Despite this, 2 Live Crew's parody was released in June or July of 1989 (*Campbell v. Acuff-Rose Music, Inc. 1994)*.

Almost a year later Acuff-Rose filed suit against 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement. The district court granted a summary judgement for 2 Live Crew on the grounds that 2 Live Crew's recording was a parody and that, as such, while the "heart" of the song was copied, it was not more than was necessary to evoke the original. The commercial purpose of the recording was not considered a bar to a finding of fair use in the case of a parody, and 2 Live Crew's parody was unlikely to damage the market for the original Orbison recording (*Acuff-Rose Music, Inc. v. Campbell 1991)*.

On appeal, this decision was reversed. The appeals court agreed that 2 Live Crew had created a parody but felt that the commercial nature of the parody *required* that the first of the four factors relevant to a fair use defense, the nature and purpose of the use, weigh against such a defense. They also decided that, because 2 Live Crew had used the "heart" of the original, they had borrowed too much. Finally, the appeals court felt that the commercial nature of the use *presumed* harm to the market for the original recording *(Campbell v. Acuff-Rose Music, Inc. 1992)*.

In 1994, the Supreme Court reversed the appeals court and issued a definitive ruling on parody and fair use. The Supreme Court decision, authored by Justice Souter, first agrees that 2 Live Crew's use of "Pretty Woman" would be a violation of copyright if it were not a parody. The Court felt that 2 Live Crew's version of "Pretty Woman" "...reasonably could be perceived as commenting on the original or criticizing it, to some degree." *(Campbell v. Acuff-Rose Music, Inc 1994 at 1173).* The Court pointed out that parody is considered a form of criticism according to the common law interpretation of the Copyright Statute and that the intent in writing the statute was to preserve the common law interpretation which would require a case-by-case evaluation of each potential copyright infringement claiming a fair use defense. It is not allowable, the Court said, to simplify the task with "bright-line rules" that specify exactly what is and what is not protectable under the Fair Use Doctrine. The Court cleared up some confusion as to what would constitute a legitimate parody, but indicated that final determination of whether a particular recording wasin fact a parody would have to be decided on a case-by-case basis.

> For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works...If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminshes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing. *(at 1172).*

The Court evaluated 2 Live Crew's parody according to the four factors relevant in a fair use defense. Justice Kennedy, in his concurring opinion, summed up the Court's finding in regard to the first of the four factors, the purpose and character of the use, by saying, "...parody may qualify as fair use regardless of whether it is published for performed for profit." *(at 1180).* The Court pointed out that the commercial or educational nature of a work is only one factor that must be weighed in determining a fair use defense. The Court said that the more "transformative" (i.e., original) the parody, the less important the extent of its commerciality.

The Court felt that the second factor in determining fair use, the nature of the copyrighted work, was not ever likely to help much in separating the "fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works." *(at 1175).*

In regard to the third factor, the amount and substantiality of the copying, the Court acknowledged that the permissible amount would vary depending on the nature of the use.

> Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation...When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable...Copying does not become excessive in relation to parodic purposes merely because the portion taken was the original's heart. *(at 1176).*

The Court did emphasize, however, that a parody should contain substantial original content. As Justice Kennedy said in his concurring opinion, "...courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses." *(at 1181).*

The Court agreed with the earlier appeal's court decision in *Fisher v. Dees (1986)* in evaluating the final factor critical to a fair use defense, the effect on the market for the original work. A parody may legitimately suppress demand for the original through its criticism similar to the way a scathing theatrical review can supress demand for tickets to a Broadway show. To cause harm cognizable under the *Copyright Statute*, the parody would have to replace demand for the original.

So a parody, if it is sufficiently transformative and targets the original composition it is using, may qualify for a fair use defense even if it is intended for commercial profit and samples the "heart" of the original work.

Summary

In regard to copyright law, digital samplers run up against some formidable barriers in producing their art. Most of the raw material used by samplers is copyrighted. A sampler producing a work containing extremely short samples, ones that cannot be recognized as the work of any particular artist, where no single sample comprises the heart of the compilation, can probably forgo obtaining clearances from the copyright owners. It is important that samplers acknowledge the contributions of others without passing off that work, intentionally or accidentally, as their own. One sampler has suggested using a form of scholarly footnoting (Korn 1992). It is also important that samplers not use the name or identifying characteristics of any sampled artist in publicizing and promoting their compilation. Colchamiro (1992) argues that if samplers fail to "negotiate openly and fairly with copyright owners, they will not be able to avoid expensive lawsuits, and this exciting new musical genre will be prevented from growing to maturity" (p. 178). What Colchamiro fails to note in her essay is the extreme difficulty this presents for certain kinds of samplers. While many rap groups may sample only two or three previously recorded musical compositions in any given work, the "found sound" artists may incorporate literally hundreds of samples in any one recording. Those samples may come from previously recorded musical compositions, but they may also come from broadcast radio and television, cable television, video taped films, etc.

Samplers should avoid the use of "unpublished" samples, such as bootlegs and studio or engineering outtakes. The copyright holder's right of first publication is a strong presumption in copyright law.

Samplers using longer samples, particularly when those samples comprise the most valuable or recognizable portion of the original work, should obtain clearance from the copyright holder. The government could make this process easier by working with the industry to set-up a clearinghouse for such sampling requests and fixing reasonable royalty rates. In this way the right of the copyright holder to be compensated for their work and the desire of the sampler to create their art both could be met. The fact that no such system currently exists does not release samplers from their obligation to obtain clearance. The only exception to this obligation is when a clear parody is involved. The courts will allow for substantial copying under fair use for purposes of parody, providing the parody cannot be mistaken for the original or replace demand for the original (Schwartz 1993).

The legal obligations of samplers do not seem overly burdensome. Nevertheless, found-sound artists sometimes find themselves running afoul of the law. The lawsuit involving the San Francisco group, Negativland, provides a good illustration of what can happen when such a group both ignores the law and runs up against a powerful adversary. The Negativland case, like most civil lawsuits, was settled out of court. What makes it a particularly good example is the fact that Negativland chose to release all relevant (and irrelevant) documents pertaining to the case to the public. In most out-of-court settlements, the general public is not privy to the private correspondance of the litigants, and many times the settlement is even sealed to public eyes. More cases of this type are settled out of court than in. The remainder of this essay will trace Negativland's strange journey into "legal-land" and attempt to determine whether they were treated "fairly" by the legal system.

The Trials and Tribulations of a group called Negativland

On September 5, 1991, Negativland released a new album, *U2 Negativland.* Two weeks after its release, a federal judge issued a temporary restraining order. By October a settlement was reached (Korn 1992). Following is a discussion of the factors that led up to this settlement and its aftermath. There are several questions that need to be addressed. Was the lawsuit against Negativland legally justified? Were the consequences of that lawsuit too severe? There is a delicate balance to be achieved between protecting the legitimate interests of copyright holders and suppressing creative speech. Negativland believes that it has been unfairly silenced through the heavy handed use of law and economic sanctions. The remainder of this essay will attempt to determine whether the law was applied fairly to Negativland and examine the consequences of that application.

Island Records Ltd. v. SST Records

The *U2 Negativland* recording contains two songs. The first song samples approximately one minute's worth of portions of U2's "I Still Haven't Found What I'm Looking For." In addition to the sampling, the song "...includes a smarmy voice making fun of Bono's lyrics, while electronic noise further deconstructs the song" (*U2's Label Stops...* 1991, p. E4)[6]. The second song on the record contains a modified instrumental version of "I Still Haven't Found What I'm

Looking For" that is not an actual recording of U2. This instrumental version includes a variety of off-air radio samples and what appear to be studio outtakes of DJ Casey Kasem. In these outtakes Kasem denigrates U2 and uses indecent language.

Suit was filed in the United States District Court in the central district of California two weeks after the release of *U2 Negativland* by companies representing the interests of U2. The plaintiffs were Island Records Ltd., Island Records Inc., Warner Chappel Music International Ltd., and Warner/Chappel Music, Inc.. Named as defendants in the case were SST Records (Negativland's record company), Seeland Media-Media (their publisher), Negativland (the group), and each individual member of Negativland. (*Island Records Ltd. v. SST Records*, 1991)[7]

Island Records et.al. alleged the following infringements: 1) that the packaging and labelling of *U2 Negativland* would deceive a consumer into thinking that the recording was the latest release from U2; 2) that the first song makes use of an unauthorized sample from U2's "I Still Haven't Found What I'm Looking For;" and 3) that the second song will likely offend consumers who were deceived into thinking they were buying a U2 album and will, therefore, cause harm to U2's reputation (*Island Records Ltd. v. SST Records*).

The first complaint, that the packaging and labelling of Negativland's recording was deceptive, was based on the nature of the cover design for the album and the liner notes. The artwork on the cover of *U2 Negativland* shows the letter U and the numeral 2 in large, bold print. In fact, "U2" covers approximately 90 percent of the cover. Superimposed over "U2" is a small silhouette of the U2 spy plane. In small print along the bottom edge of the cover is "NEGATIVLAND." (see attachment). The liner notes on the album identify the song on the recording as "I Still Haven't Found What I'm Looking For," the same title as one of the songs recorded by U2 on the band's *The Joshua Tree* album. In addition, the names of the members of U2 appear in two places in the liner notes and on the CD label. Island Records alleged that all of these put together would lead the average consumer to assume that the album was a new release by U2. Thus, Negativland was accused of trying to pass off their work as the work of U2 and/or profiting by the use of U2's name and professional reputation. This was considered to be a violation of the *Lanham Act's* prohibition of unfair competition (*Island Records Inc. v. SST Records)*.

Casual observation of the album package does tend to convey the impression that this is an album by U2 called *Negativland* rather than the reverse, especially for the consumer who may have heard of U2 but not of Negativland. Negativland attempted to defend the design of their album cover in November of 1991.

> Does our packaging look like a new release by the group U2? *Yes, of course it does...* at first. But upon closer inspection it reveals itself to be something else. Closer inspection is one of the things we like to promote...Further, the context in which any potential confusion would take place is a retail record store. The first clue to record store employees would be that our single arrives from SST, not Island, and in small quantities, not the hundreds Island would send. Ours would be located in the "Indies" bins common to most outlets, not the general "Rock" bins where U2 records are found. Ours would be filed under "N," not "U." These logistics aside, let's assume someone does buy our record thinking it's theirs. Does Island really believe that the U2 fan will be satisfied with such a mistake and, returning ours or not, not proceed to buy U2's new record?[8]

Ten days later, in a letter to Chris Blackwell at Island Records Ltd. in London, Negativland admitted, "The cover was certainly a deceptive act on our part, but we would have gladly recalled the record and changed the cover on your simple demand."[9]

The second complaint alleged that Negativland had used an unauthorized sample of U2's recording of "I Still Haven't Found What I'm Looking For." In the brief, Island Records established ownership of the copyright and called the use of the sample a "blatant case of copyright infringement" *(Island Records v. SST Records 1991).* Comparison of U2's original and Negativland's version of "I Still Haven't Found What I'm Looking For" indicates that Negativland did sample the "hook" or heart of the U2 song and would have been obligated to obtain copyright clearance had this not been a parody (see Note 6 for transcripts of the two versions). As indicated earlier in this essay, the courts do allow for rather substantial copying in the case of parody *(Campbell v. Acuff-Rose Music, Inc. 1994).* At the time Island Records suit against Negativland was filed, *Elsemere Music Inc. vs. NBC (1980), Fisher v. Dees (1986),* and the original district court finding in favor of 2 Live Crew *(Acuff-Rose v. Campbell 1991)* had been decided. Negativland's song clearly builds upon the original and contributes something new for humorous effect or commentary. Nor does it seem likely that the existence of Negativland's version of "I Still Haven't Found What I'm Looking For" would replace demand for U2's hit version which was released in 1987. As Negativland has asserted[10], its sampling of the U2 song would seem to be a case of fair use. This is supported in retrospect by the Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc. (1994).*

The third complaint, that the second song would offend U2 fans, is based on the assumption that U2 fans would mistake the Negativland record for a U2 release and would find the foul language offensive. In particular, Island Records expressed outrage over the "...expletives, curses and scatological language which...will undoubtedly anger and upset parents of youngsters who purchase the *U2 Negativland* record." They went on to assert "...that U2 has cultivated a clean-cut image, and its recordings never include such language. The band's image will be tarnished, and the name and mark 'U2' and the goodwill associated with it, will be substantially harmed as a result..." *(Island Records Ltd. v. SST Records).* In addition to the deceptive cover, Island Records bolstered its argument that deception would take place by noting that the release of *U2 Negativland* coincided with the long anticipated release of U2's newest album. Island Records considered this a deliberate attempt to capitalize on U2's fan's eagerness for the new album. Negativland denied any such nefarious intent.

> As to Island's point about scheduling our single to coincide with U2's new release, we must plead interesting coincidence... [we] neither knew nor cared that U2 was about to release another chart-busting epic. Our single was scheduled for fall release because our market stems primarily from college radio airplay, and that's when school resumes and the listening population is largest. Fall is also a prime time to release throughout the record industry, which is probably why U2's new record was also scheduled for fall. It seems clear that both Island and SST were attempting to take advantage of the same situation, not each other[11].

Negativland's defense of the release date of their album seems reasonable, and it does seem unlikely that any U2 fan would mistake Negativland's work for that of U2. At worst, a deceived consumer would have to make a trip back to the record store to return the Negativland album. Those who were unable or unwilling to make such a return trip would be out the cost of the album. Any consumer so deceived would rightfully feel defrauded, but by Negativland - not by U2. Absent any proof of harm to U2's reputation, the third complaint seems specious.

In sum, of the three complaints lodged against Negativland, only that of deceptive packaging seems legitimate. Certainly, Negativland and SST Records should have known better. It was a practical joke, a prank, that didn't quite work out. Nevertheless, SST Records decided to settle the lawsuit according to the terms set by Island Records. SST Records did not, apparently, attempt to fight the charge of copyright infringement which they might have won. Negativland felt "forced" to accept the settlement.[12]

The Settlement

The settlement agreed to by SST Records contained the following provisions:

1. Everyone who received a copy of the record, including record distributors and stores, radio stations, writes, etc. was notified to return it under penalty of imprisonment and fines. Once returned, the records were forwarded to Island Records for destruction.
2. All of SST's on-hand stock of the record, in any form, was to be delivered to Island for destruction.
3. All mechanical parts used to prepare and manufacture the record were to be delivered to Island for destruction.
4. The copyrights in the recordings themselves (the two songs on the album) were assigned to Island and Warner-Chappel.
5. SST was ordered to pay Island $25,000 and half the wholesale proceeds from the copies of the record that were sold and not returned.[13]

Negativland estimated that the total cost to them, including legal fees and the cost of the destroyed records, cassettes, and Cds, was at least $70,000 - more money than they'd made in the twelve years of their existence. (Since 1980, Negativland had released 5 albums, 4 cassette-only recordings, 1 video, and 1 single - *U2 Negativland*).[14] It may seem bad enough that Negativland's little prank cost them the copyright on their work and, therefore, the ability to control the use of that work, and a significant financial cost, but that was not the end of their troubles.

Negativland had expected SST Records to share the burden of the damages resulting from this lawsuit. However, SST Records reminded Negativland of an Indemnity Agreement they had signed with the record company in 1990. In the record contract that Negativland signed with SST Records on September 10,1990, Negativland agreed to "indemnify, save, and hold SST Records harmless from any and all loss or damage (including attorney's fee) arising out of or connected with any claim by a third party..."[15] SST records averred that the whole sorry mess with Island Records had cost them a total of $90,624.33 and that they expected Negativland to reimburse them for that amount. In addition, Negativland had accepted advance payments totaling $4,500 from SST Records for two new albums of Negativland recordings. When Negativland attempted to leave SST Records, they were informed that, if they did not turn over the master tapes of the new albums (or repay the advance), suit would be filed against them.[16]

Negativland responded that they had consulted with "a number of entertainment lawyers" who told them that the indemnity clause did not apply to the type of lawsuit brought by Island Records. They also replied that they did not possess the master tapes of the new recordings, because the new recordings were not yet completed. They indicated that they could not afford the digital editing of the new recordings, because SST had withheld royalty payments from their past work for SST as payments on their debt.[17] Negativland thus found itself in the position of being unable to profit from its past work and unable to produce any future work. Negativland was gagged.

Negativland did attempt to dig its way out of this financial and legal hole by trying to get Island/Warner-Chappel Records, which now owned the copyright on *U2 Negativland*, to release that record. Island Records declined to release the record themselves but told Negativland that if they could get permission from the copyright holders whose work was sampled in the recording, Island would return the recording to Negativland and they could release it themselves (minus the deceptive packaging, of course). Island agreed to let them use the sample from the U2 song, but they still needed to get permission from Casey Kasem to use the studio outtakes from his American Top 40 Radio Show that they had sampled in the second song on the *U2 Negativland* record. Casey Kasem's lawyers informed Negativland that "Mr. Kasem will not grant such permission and will pursue all legal remedies available to him in the event you release the U2 Negativeland [*sic*] single again or in any way use the unauthorized outtakes of Mr. Kasem...[f]urthermore, we are sending a copy of this letter to Island Records so there can be no mistake about this matter."[18] Even though an argument might be made that the samples of Kasem were used for the purpose of parody, the samples were from an unpublished source and unlikely to qualify for fair use. It seems likely that Kasem was not aware of the use of his outtakes until after *U2 Negativland* was withdrawn from the market.

Was the lawsuit against Negativland justified? In at least one particular it was. The cover to *U2 Negativland* was deceptive. In regard to the copyright infringement of U2's "I Still Haven't Found What I'm Looking For," Negativland was engaging in parody and extensive sampling is fair use in that circumstance. U2's reputation was not likely to be damaged by the sampling; that complaint was specious.

Negativland escaped a lawsuit in regard to their sampling of studio outtakes from the Casey Kasem Top 40 Radio Show. Because studio outtakes are unpublished, it is likely that a lawsuit regarding that appropriation would have been justified. As it stands, Kasem appears content to prevent any further use of those samples and not to seek damages based on their short lived public release. This seems a reasonable response on Kasem's part. By itself, it does not prevent Negativland from engaging in creative speech. All it does is prevent one piece of their creative work from being released.

What is unreasonable is the aftermath of the Island Records lawsuit. But is the law responsible for this mess, or does the blame lie in the way the suit was handled? SST Records did not attempt to fight the lawsuit. They settled, they said, because their lawyers informed them that to fight the case - win or lose - would cost around $250,000.[19] They blamed Negativland for treating the "whole episode as a joke at SST's expense...they badgered the lawyers that we had to hire with irrelevant, time-wasting and injunction-violating communications which only drove up our legal expenses without helping to defend our cause...our lawyers [threatened] a few times to drop our case because they didn't want to be associated with flaky, irresponsible clients who are arguing irrelevant, amateur legal points."[20] In retrospect, Negativland should have taken the case more seriously and hired their own lawyer. Their surprise when SST Records invoked the indemnity clause in their contract reflects a certain naivete.

While perfectly justified in filing their lawsuit alleging violation of the Lanham Act due to the deceptive labeling of *U2 Negativland*, it seems sad that Island Records Ltd. et. al. couldn't find a less damaging way to correct the problem. Given the relative sizes of Island Records/Warner-Chappel and SST Records, it seems likely that a simple phone call or letter, lawyer to lawyer, threatening a lawsuit would have been sufficient to have the record withdrawn from the market for repackaging. Island Records willingness to allow Negativland to re-release the recording (minus the deceptive packaging) seems to indicate that the copyright infringement part of the complaint was not of great concern. Island Records et.al. were probably well aware of the weakness of this complaint given the parodic nature of Negativland's recording. When filing suit, it seems common practice to throw in any conceivable complaint. Perhaps the thinking is that if you give the court a few specious complaints to throw out, they will be more likely to grant the complaint you really care about. Had Island Records et. al. asked only for relief from the deceptive packaging, Negativland would not have lost the copyright to their work. While SST Records and Negativland would have suffered some financial loss, the end result would not have been the silencing of creative voices.

SST Records could have avoided the risk of a copyright infringement lawsuit, had they requested permission to use the U2 sample. While technically they had no need of permission, Negativland's recording being a parody, it probably would have cost them less to pay the royalty fee. It would have helped even more had there been a form of compulsory licensing for samples, whereby such permissions would be automatic and a reasonable fee standard. On the one hand, a parodist need not pay for permission to use the original work, on the other hand, paying for a license under such a system could be viewed as a form of anti-lawsuit insurance. Even when you are in the right, fair use defenses are determined in court on a case-by-case basis. For the small sampler with a relatively limited audience, the license would be cheaper than the lawyer.

Following the trials and tribulations of Negativland proves to be quite instructive. There are several lessons to be learned. First, it is not a good idea to challenge the law with "school-boy" pranks, especially when those pranks can cause your work to be mistaken for the work of another. Second, even if you are in the right, you may not be able to afford to prove it in court. Third, read carefully any contracts you sign. An Indemnity Clause may come back to haunt you. Finally, a form of compulsory licensing for digital sampling is needed. Copyright holders deserve to be compensated for their work, but, at the same time, we don't want to suppress the creative new work of the found-sound artist.

Postscript: As of this writing Negativland has resolved its difficulties with SST Records and is back in business, but they never regained the copyright to their work *U2 Negativland*.

Notes

1. Excerpt from a letter dated March 10, 1992 from Negativland to U2. Released to the public by Negativland in August of 1992.

2. This quote comes from a CD released by Negativland in limited quantities in 1992. The CD accompanied a packet of information pertaining to the Island Records lawsuit and its aftermath.

2. *Id.*

4. Biz Markie attempted to defend their unauthorized use of O'Sullivan's music on the grounds that O'Sullivan did not really own the copyright, which the court rejected based on documents submitted by O'Sullivan and the fact that Biz Markie's record company had written to O'Sullivan requesting permission to use the song. Another defense attempted, that was rejected as "totally specious" by the court, was that Biz Markie should be allowed to infringe copyright because others in the rap music business were also engaging in such behavior. In addition to infringing on O'Sullivan's copyright, Judge Duffy found Biz Markie guilty of violating the Biblical commandment against theft! *Grand Upright Music Limited v. Warner Brothers Records, Inc.*

5. In *Fisher v. Dees* the plaintiffs alleged that the defendant's parody *When Sunny Sniffs Glue* infringed upon their recording of *When Sunny Gets Blue.* In *Elsmere Music Inc. v. NBC* the plaintiffs alleged that the *Saturday Night Live* parody *I Love Sodom* infringed upon their recording of *I Love New York.* In *Acuff-Rose Music, Inc. v. Campbell* the plaintiffs alleged that 2 Live Crew's parody version of Roy Orbison's *Oh, Pretty Woman* was an infringement (2 Live Crew described a "big hairy woman, a bald-headed woman, and a two timin' woman" in their parody).

6. Following are the two versions of the song transcribed from audio tapes (to the best of the author's ability).

U2's version

I have climbed the highest mountain
I have run through the fields
only to be with you
only to be with you
I have run
I have crawled
I have scaled these city walls
these city walls
only to be with you
but I still haven't found what I'm looking for
but I still haven't found what I'm looking for
I have kissed honey lips
felt the healing fingertips
they burn like fire

this buring desire
I have spoken with the eternal angels
I have held the hand of the devil
It was one of the nights
I was cold as the stone
but I still haven't found what I'm looking for
but I still haven't found what I'm looking for
I believe in Kingdom come
when all the colors bleed into one
bleed into one
yes I'm still running
you broke the bonds
loosened chains
carry the cross
of my shame
of my shame
you know I believe this
but I still haven't found what I'm looking for
but I still haven't found what I'm looking for
but I still haven't found what I'm looking for
but I still haven't found what I'm looking for

Negativland's version *(samples from broadcast radio, particularly Casey Kasem's American Top 40, overlay and interrupt most of this recording. The transcribed words are those written and performed by Negativland. U2's recording of the same song can be heard in the background at the beginning and end of the recording).*

I have climbed the highest mountains, and guess what?
I've run through the fields
just to be with you
no one else, just you, and guess what?
I have run
I have crawled
I have scaled these city walls
yeah, that's really great
I can't believe I did it but, nevertheless, I have done that for you
only to be with you, I've done all these things
yeah with you, the fat one, that's it
you're the one that I want to be with
but, on the other hand, I still haven't found what I'm looking for
but, on the other hand, I still haven't found what I'm looking for
nope, definitely not, I just can't seem to find it
nope, definitely not, I haven't found it
and here's what else I've done
I have kissed honey lips
felt the healing in her fingertips
yeah while I was doing all that,
you know, all the kissing and the honey lips,
it burned like fire, and it reminded me of cheap melting plastic
the kind that makes white clouds of vapor gas
and then when it catches on fire makes those little strings of black smoke
with those little ashes attached to them
thats how it was kissing honey lips

I still haven't found it, what I'm looking for that is,
I just don't know where the hell it is
I just can't seem to find it
[segment with broadcast samples featuring Casey Kasem]
I was a worm in the night
and cold as a stone
and I believe in Kingdom come
and all the colors bleeding into one big mess
probably have to get out the STP cleaner on that one, maybe the 409
you broke the bonds, broke the God-damned bonds
you loosened the chains
you carried the cross of my shame,
shame shame shame shame shame
you know I believe it,
you know I don't know what I'm talking about
but, nevertheless, I still haven't found it
I haven't found what I'm looking for
I haven't found it
I'm looking for it, but I don't even know where it is
I don't really know anything anymore
I don't really know what to do, or do I?
but I still haven't found it
It doesn't make sense, but I still haven't found it
I'm looking
I don't know what I'm looking for, you know,
but I'm looking for it
I just don't know much of anything
maybe I ought to be shot point blank in the "stamper" tonight
well, I'll be jiggered!
there it is

7. Excerpts from *Island Records Ltd. v. SST Records* were made available to the public by Negativland in August of 1992. This case was settled out of court.

8. Excerpted from Negativland's first press release of November 10, 1991. Made available to the public in August of 1992.

9. Excerpted from a letter dated November 20, 1991. Made available to the public by Negativland in August of 1992.

10. See Negativland's first press release of November 10, 1991.

11. *id.*

12. *id.*

13. Paraphrased from Negativland's first press release of November 10, 1991.

14. *id.*

15. Excerpted from a letter from SST's lawyers to Negativland dated February 26, 1992. Released to the public by Negativland in August of 1992.

16. *id.*

17. From a letter from Negativland to SST's law firm dated March 5, 1992. Released to the public by Negativland in August of 1992.

18. Excerpted from a letter from Casey Kasem's law firm to Negativland dated April 29, 1992. Released to the public by Negativland in August of 1992.

19. From SST Records first press release dated December 20, 1991. Released to the public by Negativland in August of 1992.

20. Excerpted from SST Records second press release dated February 3, 1992. Released to the public by Negativland in August of 1992.

References

Acuff-Rose Music, Inc. v. Campbell, 754 F.Supp. 1150 (M.D. Tenn. 1991), *reversed and remanded* 972 F2d 1429 (1992), *appeal reversed and remanded* 114 S.Ct. 1164 (1994).

Allen, James P. Jr. Look What They've Done To My Song Ma' - Digital Sampling in the 90's: A Legal Challenge for the Music Industry. 9 University of Miami Entertainment and Sports Law Review 179 (1992)

Brown, Jeffrey H. "They Don't Make Music the Way They Used To": The Legal Implications of "Sampling" in Contemporary Music. 1992 Wisconsin Law Review 1941 (1992).

Colchamiro, Sharon. To Clear or Not To Clear: Licensing Digital Samples. 5 Hofstra Property Law Journal 157 (1992).

del Peral, Sonya. Using Copyrighted Visual Works in Collage: A Fair Use Analysis. 54 Albany Law Review 141 (1989).

Elsmere Music Inc. v. National Broadcasting Co., 482 F.Supp. 741 (S.D.New York 1980), *affirmed per curiam*, 623 F.2d 252 (2d Cir. 1980).

Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).

Grand Upright Music Limited v. Warner Brothers Records, Inc., 780 F.Supp. 182 (S.D. New York 1991).

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

Johnson, A. Dean. Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits. 21 Florida State University Law Review 135 (1993).

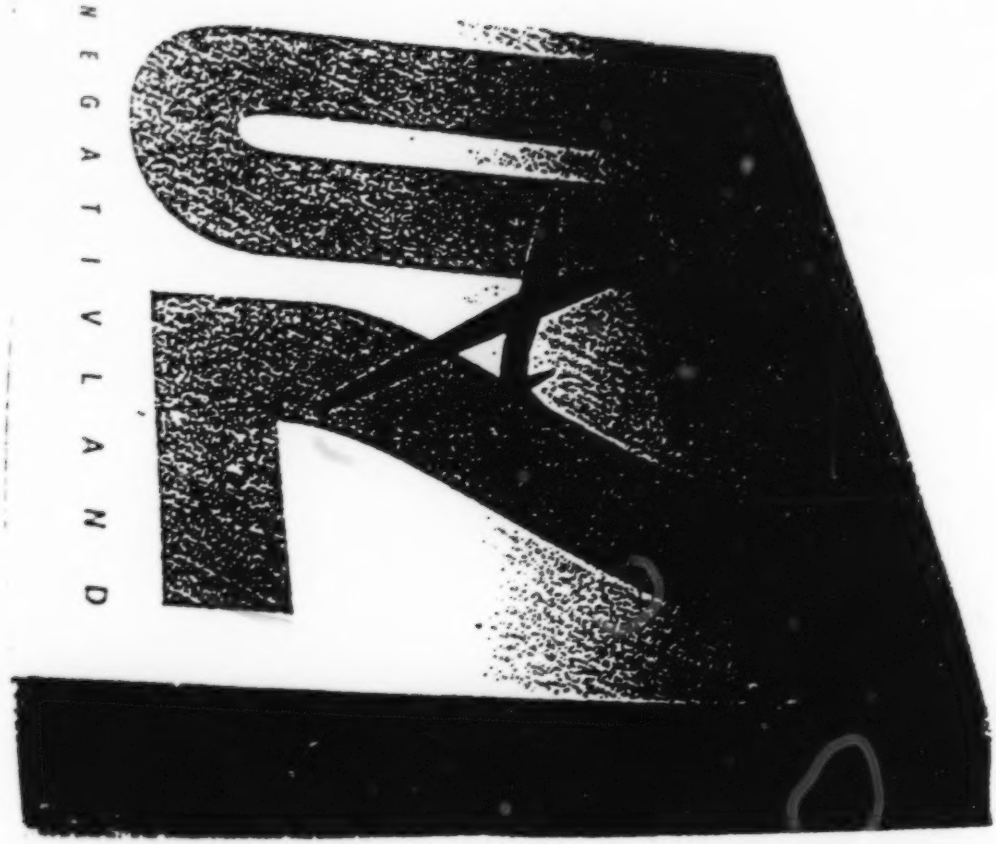
Korn, Alan. Renaming That Tune: Aural Collage, Parody and Fair Use. 22 Golden Gate University Law Review 321 (1992).

Sanjek, David. "Don't Have To DJ No More": Sampling and the "Autonomous" Creator. 10 Cardoza Arts and Entertainment Law Journal 607 (1992).

Schwartz, Matthew H. (1993). On Target with the Parody Defense to Copyright Infringement. In Robert Thorne and John David Viera (Eds.), Entertainment, Publishing and the Arts Handbook. 1993-94 Edition. New York: Clark, Boardman, Callaghan.

U2's Label Stops Sales of Parody. (September 23, 1991) San Francisco Chronicle. E4.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).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